City of FRESNO

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MUNICIPAL LAW GUIDEBOOK

FOR CITY OF FRESNO ELECTED OFFICIALS

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INTRODUCTION

This is the biennial update to our Municipal Law Guidebook for City of Fresno Elected Officials ("Guidebook"). The Guidebook is intended to provide an overview of some of the basic laws and legal procedures for elected officials of the City of Fresno.[1] The Guidebook serves as an introduction to municipal law for newly elected officials and is an update for current officials continuing in their positions.

It is important to note that newly elected officials are affected by some of these laws before they even take office. For example, the Brown Act expressly provides that newly elected officials who have not yet assumed office are subject to the Brown Act. Thus, a quorum of holdover Councilmembers and newly elected Councilmembers, in any combination, which meets to hear, discuss, or deliberate upon any matter which comes under the Council's deliberation constitutes an unlawful meeting of the Council. Another example is in the area of gifts and income received within twelve months of a decision made by an elected official. As discussed in Section 3 of this Guidebook, income and gifts received twelve months prior to an elected official's consideration of a matter may require disclosure and disqualification.

City of Fresno elected officials will also sit on other boards and commissions. This Guidebook should be used as a reference for your role on other public boards and commissions. For example, the Council sits as the Board of Directors for the City of Fresno Redevelopment Agency. Most of the rules in this Guidebook are applicable to Councilmembers sitting as Boardmembers for the Redevelopment Agency.

This Guidebook is meant only as an overview to highlight laws and procedures with which elected officials must acquaint themselves. Certain of these laws, particularly conflicts of interest, are very comprehensive, and fact intense, and make the elected official personally liable. While there are basic rules, most decisions in the conflict of interest area are made on a case by case basis.

We strongly urge the Mayor and Councilmembers to read this Guidebook and to keep it handy at all times. The City Attorney's Office will make every attempt to assist the Mayor and Councilmembers. In the event this Office is unable to provide assistance because the nature of an inquiry or concern is private in nature or creates a conflict of interest, we will refer the elected official to the appropriate agency or to his/her private attorney.

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[1] While it is intended for elected officials, the Guidebook is a valuable resource for other City officials and employees.

SECTION 1.
MAYOR-COUNCIL FORM OF GOVERNMENT

The City's organic law is the Charter of the City of Fresno ("Charter"). The Charter is often called the City's "constitution." It may be amended only by the City voters. The Council also promulgates laws by ordinances codified in the Fresno Municipal Code and by resolution. The Mayor may issue executive orders consistent with the Charter, the Fresno Municipal Code ("FMC"), and other applicable laws and regulations. Finally, the City Manager may issue administrative orders.

On April 27, 1993, City voters adopted numerous amendments to the Charter. Among these Charter amendments were the various amendments which created the Mayor-Council form of government. This form of government is often referred to as the Strong Mayor form of government. Prior to that, the City was governed under a Council-Manager form of government. The Mayor-Council form of government became operative in January 1997.

Charter Section 400 identifies the Mayor as the Chief Executive Officer of the City and it lays out specific duties, including:

- The execution and enforcement of all laws and policies.
- The power to appoint, control and remove the City Manager.
- The preparation of the annual City budget for deliberation and approval.
- Veto power over all Council legislative and budgetary acts, except as otherwise provided in the Charter.
- The power to serve as the liaison between the Administrative Service and Council.
- The power to foster a sense of cohesion among Council and educate the public about the needs and prospects of the City.
- The power to promote economic development, recommend legislation and policy and investigate the affairs of the City under the Mayor's supervision.

While the Mayor is given new powers to recommend legislation and policy, prepare the budget, and veto certain Council actions, the Mayor is also removed from the direct Council legislative deliberation and is not a voting member of the Council.

Under Charter Section 500, the Council remains vested with a broad grant of all powers granted to the City except as otherwise expressly provided in the Charter. Section 500 reads as follows:

> SECTION 500. POWERS VESTED IN THE COUNCIL. All powers herein granted to and vested in the City of Fresno shall, except as herein otherwise provided, be exercised by a Council to be designated the Council of the City of Fresno. Said Council shall the (sic) be governing body of the City and, subject to the express limitations of this Charter, shall be vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the Constitution of the State. Each Councilmember shall have the right to appoint and remove his or her own Council Assistant.

The Council, therefore, retains specific powers including the following:

- To make all laws involving municipal affairs subject to the Charter and the Constitution.[2]
- To exercise all other powers that a municipal corporation might or could exercise subject to the exceptions noted in the Charter.[3]
- To appoint and remove the City Attorney and City Clerk.[4]
- To control all the City legal business and proceedings.[5]

The Charter limitations continue the prohibition on the Mayor's and Council's interference in the administrative service of the City[6] except by official action taken in policy matters or to obtain information. Otherwise, the Mayor and Council are to deal with the administrative service through the City Manager.

While the Council is empowered to appoint the City Attorney and City Clerk,[7] the Mayor is provided the sole authority to appoint and remove the City Manager and to exercise control over the City Manager.

Under Charter Section 605, the Mayor has veto power over all legislative acts. This is true whether Council takes action by ordinance, resolution, or other action such as a minute resolution or approval of a contract. For purposes of the Mayoral veto, Charter

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2 Charter § 200.

3 Charter § 200.

4 Charter § 800.

5 Charter § 803(g).

6 Charter § 706.

7 Charter § 800.

Section 605 sets forth some specific acts that are deemed legislative acts. Attached as exhibits are the following:

(1) Matrix on Council's Actions Subject to Mayor's Veto under Charter Section 605.

(2) Flow Chart when Council's actions are subject to the Mayor's veto and reconsideration by Council.

The City Attorney's Office has issued numerous legal memoranda regarding the Mayor-Council form of government. We strongly recommend the Mayor and Councilmembers read two particular opinions as they offer a comprehensive overview and analysis. The two opinions are FY 98-1, "*Governance Under the Mayor-Council Form of Government"* and FY 2000-1, "*Nature and Extent of Mayor's Executive Powers Under Mayor-Council Form of Government*" (attached as exhibits).

The Charter requires that the Council hold regular meetings. It also requires that the Council establish rules for the conduct of its proceedings. The Council has done this by adoption of Chapter 2, Article 1 of the FMC. Also, in September of 1997, Council adopted Resolution No. 97-222, which established the Rules of Protocol for the conduct of all meetings of the Council. (The Rules of Protocol, and its amendments, are attached as an exhibit thereto.) The Rules of Protocol supplements the FMC, and does not replace or take precedence over our Charter and FMC or applicable state laws, such as the Brown Act discussed in Section 2 of this Guidebook. The Rules of Protocol were adopted for the public's convenience and orderly conduct of the City's business.

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SECTION 2.
COUNCIL MEETINGS
AND THE BROWN ACT

The Ralph M. Brown Act[8] is commonly referred to as the "Brown Act" and is also known as the "Open Meeting Law." It applies to all local governmental agencies. The Brown Act is the primary guide for conducting City business. It attempts to strike a balance between public access to meetings and decisions of public bodies on the one hand and the need for confidential candor, debate, and deliberation on the other.

The Brown Act applies to the legislative bodies of local agencies in California. It applies not only to the Council as the legislative body for the City of Fresno, but it also applies to standing committees of the Council even if they comprise less than a quorum, to subsidiary boards, commissions, and committees created by Charter, ordinance or resolution, and to certain private corporations. Under our Mayor-Council form of government, the Mayor is no longer a member of the Council. As such, the Mayor is not directly subject to the Brown Act. However, if the Mayor were to participate in unlawful meetings of certain Councilmembers, the Mayor could be held in violation of the Brown Act.

Since the basic mission of the Brown Act is to ensure that decisions are made in public, there are very specific rules on how meetings must be noticed, on agenda requirements, on how meetings must be conducted, and on public access at Council meetings. The City Clerk and City Attorney work with the Council to ensure that Brown Act requirements are met. The City Clerk is responsible at the agenda and notice stage and the City Attorney is responsible for guiding the Council at meetings.

A. WHAT IS A "MEETING" AND "ACTION TAKEN?"

The term "meeting" is very broadly defined in the Brown Act as any congregation of a majority of the members of the Council at the same time and place to hear, discuss or deliberate upon any matter which comes under the subject matter jurisdiction of the Council. The Brown Act contains various rules designed to prevent the circumvention of its open meeting requirements. For example, serial meetings are prohibited and a quorum of newly elected Councilmembers and present Councilmembers is prohibited. A Councilmember's e-mail to other Councilmembers may be considered a serial meeting. Such incidents are fact intense, and will require a case by case analysis. In a recent opinion, the California Attorney General concluded that a majority of the members of the Council may not e-mail each other to develop a collective concurrence as to action to be taken by the Council without violating the Brown Act, even if the e-mails are also sent to the secretary, sent to the chairperson of the

[8] Gov. Code §§ 54950 *et seq.*

agency, posted on the website, and each printed e-mail is reported at the next public meeting.[9]

The broad definition of "meeting," together with the Brown Act's definition of "action taken," serves to ensure that the purposes of the Act are met. "Action taken" is defined in Government Code Section 54952.6 as follows:

> Action taken means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.

This definition is very broad and includes matters taken up at meetings and away from meetings. Notwithstanding this, the following are not meetings:

- A telephone conversation which does not serve to "poll" members of the Council would not be held to be a meeting for purposes of the Brown Act.

- Individual contacts or conversations between a Councilmember and any other person.

- Attendance of a majority of the members of the Council at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the Council, provided a majority of the members do not discuss among themselves specific business within the Council's subject matter jurisdiction.

- Attendance of a majority of the members of the Council at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided a majority of the members do not discuss among themselves specific business within the Council's subject matter jurisdiction.

- Attendance of a majority of the members of the Council at an open and noticed meeting of another body of the local agency provided a majority of the members do not discuss among themselves specific business within the Council's subject matter jurisdiction.

- Attendance of a majority of the members of the Council at a purely social or ceremonial occasion, provided a majority of the members do not

[9] 84 Ops. Cal. Atty. Gen. 30 (2001).

discuss among themselves specific business within the Council's subject matter jurisdiction.

- Government Code Section 54953.1 provides that the Brown Act shall not be construed to prohibit members of a legislative body from giving testimony in private before a grand jury, either as individuals or as a body.

B. TYPES OF MEETINGS

There are three types of meetings that can be called under the Brown Act. Those are regular meetings, special meetings and emergency meetings.

1. Regular Meetings.

Regular meetings are those that are held at a regular time and place established by local rules. Regular meetings of Council are held on Tuesdays. At regular meetings, the only items that can be acted upon are those that are listed on an agenda that is posted at least 72 hours in advance, with certain exceptions. For an item to be acted upon, it must be listed on the agenda as an "action item." An action item would be an item for which there is a recommendation to the Council on how to act. Items that are not action items are those that are commonly known as status reports or workshops. For those items, there can be no action taken at the meeting except to refer the matter to the Council at another meeting or to staff.

At a regular meeting, items can be added to the agenda under certain circumstances. An item may be added to the agenda by a majority vote of the entire body if an emergency arises relating to the health and safety of the public, such as a crippling natural disaster. The definition of "emergency" is so narrow that agenda items are hardly ever added under the invocation of this exception.

Another exception to the notice requirements at a regular meeting would include items where there is a need to take "immediate action" and when the need came to the attention of the City after the posting of the agenda. Agendas for regular meetings must be posted 72 hours prior to the meeting. If an item requiring action arises after that posting, the item may be placed on the agenda by a 2/3 vote of the entire Council (or if less than 2/3 of the body is present, a unanimous vote of those present). If staff or certain members of the Council were aware of the item prior to the posting of the agenda, this exception may not be used. The key requirement, the need to take immediate action on the item, must be shown by specific factual findings.

2. Special Meetings.

Special meetings are those called on an "as needed" basis for special purposes. The Council President or a majority of Councilmembers may call a

special meeting. Special meetings require at least 24 hours written notice to each member of the Council. Also, the media must be notified and the agenda must be posted 24 hours in advance. The most important thing to remember about special meetings is that only those items listed in the agenda may be discussed. No other action may be brought in front of the Council at a special meeting except those items noticed 24 hours ahead of time.[10]

3. Emergency Meetings.

New legislation regarding emergency meetings will become effective January 1, 2003. Council may call an emergency meeting on less than 24 hours notice. An "emergency" is defined as a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the Council. The media must be given one hour advance notice. An emergency meeting may also be held for a "dire emergency," defined as a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity with peril so immediate and significant that requiring Council to provide one hour advance notice may endanger the public health, safety, or both, as determined by a majority of the Council. Notice of the meeting for a dire emergency shall be given at or near the time the presiding officer notifies the members of the Council of the meeting.[11]

C. NO ACTION OR DISCUSSION OF NON-AGENDA ITEMS RULE

The basic rule under the Brown Act is that "no action or discussion shall be undertaken on any item not appearing on the posted agenda."[12] The Brown Act's agenda requirements thus cover not only "action" items but also "discussion" items.

As noted above under "Regular Meetings," the Brown Act does contain exceptions to this rule. In addition to the exceptions regarding emergency situations and the need for immediate action, there are a few other narrow exceptions to the "no discussion on non-agenda items rule." Those exceptions are:

1. Members of the Council or staff may briefly respond to statements made or questions posed by persons during public comment periods;

2. Members or staff may ask questions for clarification and provide a reference to staff or other resources for factual information;

3. Members or staff may make a brief announcement, ask a question or make a brief report on his/her own activities;

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[10] Gov. Code § 54956.

[11] Gov. Code §54956.5 -SB 1643.

[12] Gov. Code § 54954.2 (emphasis added).

4. Members may, subject to the procedural rules of the legislative body, request staff to report back to the legislative body at a subsequent meeting concerning any matter; and

5. The Council may itself as a body, subject to its Rules of Protocol, take action to direct staff to place a matter of business on a future agenda.

The exceptions are not meant to swallow the rule. Thus, the Council may not engage in any significant discussion of non-agenda items. This means that long presentations, or wide-ranging questions, answers, and comments among the Councilmembers, between Councilmembers and the public, or between Councilmembers and staff are impermissible. Comments under these exceptions must be brief.

Under these exceptions, Council can request information or a report; however, direction to staff to do things or take action is action which must be placed on the agenda first. When Council is considering whether to direct staff to add an item to a subsequent agenda, these exceptions do not allow Council to discuss the merits of the matter or to engage in a debate about the underlying issue.

To protect Council from problems in this area, the current Rules of Protocol allowing a Councilmember to request up to three items on a subsequent agenda should be followed. If a situation arises and a Councilmember wishes to consider and vote on whether to place a matter on a future agenda, then Council's consideration and vote must take place with virtually no discussion (i.e., date and time discussion permissible, but not discussion on the merits). Again, we see no need for this as Council's Rules of Protocol allow individual Councilmembers to place items on the agenda.

In summary, Council can neither take action nor discuss any items unless they are specifically posted on the agenda. Comments under the exceptions to the Brown Act must be minimal and must be brief.

D. CLOSED SESSIONS

The Brown Act expressly authorizes closed sessions under explicit circumstances that must be met. Closed session are not open to the public, and information acquired during a properly held closed session is confidential, and may not be disclosed, without Council authorization. The City may address such violations by the use of remedies currently available under law, including injunctive relief to prohibit disclosure of the confidential information, taking disciplinary action against an employee who willfully discloses such confidential information after received training or notice as to its confidentiality, and referring the member of the Council to a grand jury. The City may not however, take action against an individual for making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, expressing an opinion as to the propriety or legality of actions taken by Council in

closed session, or disclosing information acquired in closed session that is not confidential information.[13]

Closed session matters must be noticed on the agenda by category so that the public can determine why the Council is calling a closed session. In addition, the vote tallies of certain final actions taken in closed session must be announced in open session after the vote is taken. The following are the most commonly used reasons for holding closed sessions in the City of Fresno. The Brown Act also permits closed sessions for real estate negotiations, certain specified threats to public security, and the license application of a rehabilitated criminal.

1. Litigation

The most common exception to public meeting requirements under the Brown Act is for active litigation. This allows the Council to meet in closed session to hear advice from legal counsel regarding the handling of active civil or administrative litigation. The Council may also go into closed session to discuss potential litigation in very limited circumstances. Potential litigation may only be discussed when the following criterion is met:

> A point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency.[14]

This exception requires that the majority of the Council believe that there is an actual threat of litigation. Also, its legal counsel must concur in this opinion. Normally, this exception only arises whenever an actual threat has been made by a party who has the where-with-all to carry out the threat.

The Council may also meet in closed session to decide whether to initiate litigation. In addition, the Council may hold a closed session to decide whether the facts and circumstances surrounding a particular issue merit a closed session discussion.

2. Threats to Public Property; Security Threats.

Closed session may also be held on matters posing a threat to the security of public buildings, security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or public facilities. Such closed sessions may be held with the Attorney General, district attorney, agency counsel, law enforcement, or a security consultant or security

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[13] Gov. Code § 54963 -AB 1945, effective January 1, 2003.

[14] Gov. Code § 54956.9(b)(1).

operations manager.[15] Emergency meetings for emergency situations may also be held in closed session if agreed to by 2/3 vote of the members present, or if less than 2/3 of the members are present, by unanimous vote.[16]

3. Personnel.

The Council may also call a closed session to discuss personnel matters. The item must be listed on the agenda, along with the name of the employee and the purpose of the closed session. The employee subject to such a closed session has the right to determine whether the session will be held in public or private, and must receive written notice of the session at least 24 hours in advance. Personnel closed sessions may only be called to discuss the "appointment, employment, evaluation of performance, discipline, or dismissal" of an employee directly under Council control. Discussion or action on proposed compensation is prohibited in closed session, except for reduction of compensation as a result of the imposition of discipline.[17] Oblique references to discussion of salaries as part of the performance evaluation appears permissible, so long as the specific discussions as to the amount of salary increase are reserved for a properly noticed, public meeting.[18] At the end of any closed session regarding personnel actions, Council must report back at the public meeting during which the closed session is held. The report shall identify the title of the position, and the action taken affecting the employment status of the employee. However, if the report is of a dismissal or nonrenewal of an employment contract, the report shall be deferred until the first public meeting following the exhaustion of any applicable administrative remedies.[19]

4. Conference with Labor Negotiator.

One of the most common reasons to hold a closed session under the Brown Act is the labor relations exception. This exception allows the Council to discuss issues involving "salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees."[20] At such closed sessions, the purpose is for the Council to give direction to its authorized negotiators. Those authorized negotiators then meet and confer with employee bargaining groups or consult with those groups on the matters

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[15] Gov. Code §§ 54954.5, 54957 -AB 2645, effective January 1, 2003.

[16] Gov. Code § 54956.5 -SB 1643, effective January 1, 2003.

[17] Gov. Code § 54957.

[18] *San Diego Union v. City Council*, 146 Cal. App. 3d 947 (1983).

[19] Gov. Code § 54957.1(a)(5).

[20] Gov. Code § 54957.6.

listed above. Once agreement is reached, any contract must be approved in public.

E. BROWN ACT VIOLATIONS

Individual citizens may demand that the Council correct actions taken in violation of the Brown Act. Any citizen may make a written demand that the Council either declare an action null and void or cure the Brown Act defect within 90 days of any alleged violation, unless the action was taken in an open session but in violation of the agenda requirements. In those instances, the written demand shall be made within 30 days. The Council must act on the matter within 30 days of receiving the written notice. If no action is taken by the Council, any citizen may file a suit to have the action of the Council declared null and void.

If any action is successfully brought against the City for a Brown Act violation, the City may be required to pay attorneys' fees and costs. In addition, Councilmembers may be individually liable for Brown Act violations under the criminal law. Certain Brown Act violations are misdemeanors and can be punished by up to one year in jail and/or fines. For these reasons, the City Attorney's Office takes particular care in making sure that the City's business is done in the proper manner to prevent any actual or perceived Brown Act violations.

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SECTION 3.
PUBLIC RECORDS AND INFORMATION

A. WHAT IS A PUBLIC RECORD?

City records, for the most part, are open and available to the public under the California Public Records Act ("PRA").[21]

The City Attorney does not maintain City records. It is the responsibility of the custodian of records, be it the City Clerk or particular department or both, to gather and review records in response to PRA requests. We can, of course, provide legal advice relating to requests.

The PRA concerns the ability of members of the public to have access to public records maintained by various state and local agencies, including the City. The PRA was recently amended to include in the definition of local agency, any private entity that must comply with the Brown Act.[22] Public records are "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[23] The definition of "writing" was also recently expanded, to include "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."[24]

B. PUBLIC POLICY FAVORS DISCLOSURE

The general policy of the PRA, like the federal Freedom of Information Act upon which it is modeled,[25] favors disclosure of public records. Indeed, in enacting it, the state legislature found and declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[26] But, as the court in *Black Panther Party v. Kehoe* [27] noted:

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[21] Gov. Code §§ 6250 *et seq.*

[22] Gov. Code § 6252 -AB 2937, effective January 1, 2003.

[23] Gov. Code § 6252 (e).

[24] Gov. Code § 6252 -AB 1962, effective January 1, 2003.

[25] 5 U.S.C. §§ 552 *et seq.*

[26] Gov. Code § 6250.

[27] 42 Cal. App. 2d 645, 655 (1974).

> If citizenship in a functioning democracy requires general access to government files, limited but genuine interests also demand restricted areas of nonaccess. Decisional law on the subject accepts the assumption that a statute calling for general disclosure may validly define reasonably restricted areas of nondisclosure, provided that the latter are justified by genuine public policy concerns.

The PRA thus strikes a balance between "the public's right to know" and the need to maintain areas of nondisclosure for certain types of government records.[28] The PRA basically provides that, except as otherwise provided, public records are to be open to inspection at all times during the office hours of public agencies,[29] and that any person may receive a copy of any identifiable public record upon request and payment of a prescribed fee.[30]

This general right of public inspection, must be considered together with a number of categories of records that are exempt from disclosure.[31] One such category includes records that are exempt from disclosure under federal or state law.[32] To assist members of the public and local agencies, the state legislature created a list of state laws that exempts certain records from disclosure. The list is not meant to be exhaustive.[33] In addition, there is a "residual category" that permits an agency to withhold a record from disclosure, where "on the facts of [a] particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." This balancing test can be very fact intense and challenging.

C. RESPONDING TO PRA REQUESTS

As is apparent, the obligation of the City under the PRA is to produce existing documents (within the meaning of the PRA). Nothing in the PRA requires the City to conduct research or create documents that do not exist at the time of the request. The PRA was recently amended to require City staff to assist a member of the public seeking to inspect or copy a public record, to make a focused and effective request

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[28] 64 Ops. Cal A tty. Gen. 575, 579 (1981).

[29] Gov. Code § 6253, subd. (a).

[30] Gov. Code § 6253, subd. (b); See 69 Ops. Cal. Atty. Gen. 129, 131 (1986); 64 Ops. Cal. Atty. Gen. 575, 579-580.

[31] Gov. Code § 6254; *Black Panther Party v. Kehoe, supra*, 42, Cal. App. 2d at 656.

[32] Gov. Code § 6254(k).

[33] Gov. Code § 6275.

that reasonably describes an identifiable record.[34] City staff must make reasonable efforts to help the member identify records and information that are responsive to the request, or to the purpose of the request, describe the information technology and physical location in which the records exist, and provide suggestions for overcoming any practical basis for denying access to the records or information sought. These additional duties shall not apply if the City makes the requested records available, the records are expressly exempt from disclosure, or an index of the records is made available. The City is required to take the following actions in response to a PRA request:

1. Determine within ten days after receipt of request (verbal or written) whether the request, in whole or in part, seeks copies of disclosable records and immediately notify the person making the request of such determination and the reasons therefor. City staff must make reasonable efforts to assist a member of the public to make a request that reasonably describes an identifiable public record, as described above.

2. Make available all documents for inspection or copying that are responsive to the request and not exempt from disclosure. Nothing in the PRA may be construed as permitting the City to delay or obstruct the inspection or copying of public records.[35]

3. Copy and make available all responsive documents upon payment of a fee.

4. If the person making the request agrees, provide a summary of the information contained in existing documents when these documents are voluminous or in a form that is not easily reproducible.

5. If the request is denied, the City must justify withholding any record by demonstrating the record is expressly exempt under the PRA, or the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.[36] Notification of denial of any request for records shall set forth the names and titles or positions of each person responsible for the denial.[37]

6. If the request for inspection or copies of public records is in writing, and the request is denied in whole or in part, the response shall be in writing.

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[34] See AB 1014, amending Gov. Code § 6253, and adding Gov. Code § 6253.1.

[35] Gov. Code § 6253.

[36] Gov. Code § 6255.

[37] Gov. Code § 6253.

The person requesting the public record is obligated to pay for copying costs. The City may only charge a fee to cover the direct cost of duplication.[38] The amount of the fee is designated in the City of Fresno Master Fee Schedule.[39] We recommend that City staff adhere to the following procedures in responding to PRA requests:

1. Acknowledge receipt of the request, and if the request is verbal, ask that person to put the request in writing. (The person is not obligated to put the request in writing.)

2. Consult the City Attorney's Office whenever there is a question of whether a document is exempt from disclosure, whenever the document is labeled Attorney-Client Privilege, and whenever the document pertains to litigation or threatened litigation.

3. Advise the requesting party of a time and place when the responsive documents will be available for inspection and/or copying.

4. Advise the requesting party of the cost of copying the responsive documents in lieu of the foregoing option.

5. If appropriate, advise the requesting party that the documents are voluminous or in a form that they are not easily reproducible and that the requesting party has the option to pay for a City staff's summary.

D. RECORDS IN ELECTRONIC FORMAT

If the public record subject to disclosure is in electronic format, the information shall be made available in any electronic format in which the City holds the information. A copy of an electronic record shall be provided in the format requested, if the City uses that format to make copies for its own use or to other agencies.

The cost of duplication is limited to the direct cost of producing the copy of the record in electronic format. However, the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record if (1) the City is required to produce a copy of an electronic record that is produced only at otherwise regularly scheduled intervals; or (2) the request would require data compilation, extraction, or programming to produce the record.

The City is not required to reconstruct a record in an electronic format if the City no longer has the record in electronic format. If the request is in both electronic, and non-electronic format, the City may inform the requester the information is in electronic format. Nothing in the PRA may be construed as permitting the City to make the

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[38] Gov. Code § 6253(b); Opinion of the California Attorney General, No. 01-605.

[39] The Master Fee Schedule is available on the City of Fresno website.

information available only in electronic format. The City is not required to release an electronic record in the electronic form held by the City if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

E. PUBLIC RECORDS ACT VIOLATIONS

The California Supreme Court recently ruled that a City may not file a declaratory relief action solely to determine the City's obligation to disclose documents requested by a member of the public.[40] If the City refuses to supply records, the requesting person may bring an action in Superior Court to compel disclosure. If the court determines the records must be turned over, the City is required to pay attorneys' fees and court costs. If the City prevails, it is entitled to attorneys' fees only if the court finds that the request was "clearly frivolous." In general, records are seldom exempted from disclosure. Usually, refusal to disclose is based upon the privacy rights of an employee or applicant.

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[40] *Filarsky v. Superior Court*, 28 Cal. 4th 419 (2002).

SECTION 4.
CONFLICT OF INTEREST ISSUES

Conflicts of interest arise in a variety of ways. Because of the myriad of laws in this area, it is quite difficult to determine if one has a conflict of interest. This section of the Guidebook is intended to assist Councilmembers and the Mayor in recognizing situations that may give rise to a conflict of interest. The California Attorney General's Office has prepared the most comprehensive handbook on conflicts of interest. The California Attorney General will be updating the handbook, which should be available in January of 2003. We will provide copies of the handbook to the elected officials when it becomes available.

The City Attorney's Office is available to discuss conflict of interest issues. The duty is on the elected officials to present any information concerning potential conflicts of interest to the City Attorney so that advice can be provided. If we independently know of information that may create a conflict of interest, we will certainly bring it to the official's attention. However, we simply are not privy to all the transactions involving individual elected officials and, therefore, cannot be responsible for raising conflict issues for each elected official.

Conflict of interest opinions are fact intense and require significant research and analysis. For this reason, we request that questions be posed in writing and in advance of any participation on a particular matter or issue which may give rise to a conflict. Questions raised on the dais as a matter that is about to be considered by Council will usually result in conservative advice recommending to the elected official that he or she announces the conflict and disqualify himself or herself from the matter. In matters involving potential conflicts, advance preparation is very important to ensure that participation occurs in an appropriate manner.

The City Attorney serves as legal advisor to the Council and Mayor in their official capacities. It is the City's interests we represent. Because a conflict issue may affect a decision of the entire Council or of the Mayor, our practice is to provide a copy of all legal opinions and memos requested by one elected official to the rest of the elected officials.

A. COMMON LAW DOCTRINE

In 1928, the California Supreme Court enunciated the common law doctrine[41] against conflicts of interest as follows:

[41] The common law has developed through precedential court decisions. It differs from statutory law which has been created through the legislative process.

> A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.[42]

Against this backdrop of the common law doctrine, a multitude of conflicts of interest laws have been enacted. These laws are applicable to particular officers or agencies. They include threshold amounts, disclosure requirements, participation prohibitions, and other limitations.

B. POLITICAL REFORM ACT

The majority of legislation and regulations relating to conflicts of interest are embodied in the Political Reform Act[43] that was adopted by a vote of the people in a statewide initiative in 1974. The overall purpose of the Political Reform Act was designed to make sure that public officials covered by the Political Reform Act perform their duties in a lawful and unbiased manner. Public officials include officers, employees and certain types of consultants to local government. To accomplish this goal, several levels of regulation have been set up.

The first major area of regulation deals with **disclosure of economic interests**. All incoming elected officials must disclose certain types of financial interests on forms available to the public. Those forms must be submitted to the City Clerk within 30 days of assuming office by each new member. Also, on an annual basis, Councilmembers and the Mayor must update their forms to reflect changes in the previous calendar year. A second area of regulations deals with the **disqualification of public officials** from participating in decisions. The purpose of these regulations is to determine if a public official has a financial interest that would prohibit him/her from making, participating in making, or attempting to use his/her official position to influence a governmental decision in which he or she knows, or has reason to know, that he or she has a financial interest, as defined. If the public official has a disqualifying financial interest in a decision, the public official must publicly identify the disqualifying financial interest, recuse himself or herself from discussing and voting on the matter, and leave the room until after the discussion, vote, and other disposition of the matter, unless the matter has been placed on the portion of the agenda reserved for uncontested matters. The public official retains the right to speak on the issue during the time that the general public speaks on the issue.[44]

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[42] *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928).

[43] Gov. Code §§ 81000 *et seq*.

[44] Gov. Code § 87105 -AB 1797, effective January 1, 2003.

The Political Reform Act also has campaign regulations. These regulations are not discussed in this Guidebook because the City Attorney's Office does not represent elected officials in their roles as candidates. The regulations also have a category regulating lobbyists at the statewide level. Finally, the Political Reform Act regulates mass mailings sent at public expense.

1. Fair Political Practices Commission.

The administration of the Political Reform Act is handled by the Fair Political Practices Commission ("FPPC"). It is an independent statewide body that is made up of members appointed by the Governor and the Legislature. The FPPC has a full-time staff which provides assistance to local elected officials. The FPPC has forms, manuals, and related information available on the Website at www.fppc.ca.gov. The FPPC also provides informal assistance over the telephone to any person with a conflict of interest question. This is a valuable tool that can be used by all elected officials to spot conflict issues prior to a matter coming before them. The telephone advice line is available during normal business hours at (916) 322 5660 or 1 (866) ASK-FPPC [(866) 275-3772]. The staff is courteous and helpful and will get back to callers within one calendar day.

In addition to informal assistance, the FPPC also offers formal assistance through written responses. If one seeks a formal opinion, the FPPC staff will respond in writing within 30 days of the request.

In the case of a conflict of interest, the elected official in question has the duty to disqualify himself or herself. This duty cannot be delegated to staff members or to an attorney. The duty rests with the officials in question because only they know the extent of their own personal financial dealings.

Attached as an exhibit is a pamphlet entitled, "*Can I Vote? Conflicts of Interest Overview*" prepared by the FPPC to assist public officials in determining whether a disqualifying conflict or interest exists. Also attached is a fact sheet prepared by the FPPC entitled, *"Limitations and Restrictions on Gifts, Honoraria, Travel and Loans*" for local officers and employees.

2. Civil and Criminal Enforcement.

If a conflict of interest exists, there are several different agencies or persons who may bring an action to enforce the Political Reform Act. A district attorney, the California Attorney General or the FPPC may bring an action, either civil or criminal. In addition to those listed above, any person residing within the jurisdiction may obtain authorization to bring a civil action to enjoin violations or compel compliance with the Political Reform Act. Finally, a local agency may discipline persons who violate certain provisions of the Political Reform Act.

Under the criminal penalties of the Political Reform Act, a knowing and willful violation of the Political Reform Act is a misdemeanor punishable by a fine and/or imprisonment. A violator may be fined up to $10,000 or three times the amount not properly disclosed, unlawfully contributed, expended, gave, or received, for each violation. Finally, any person convicted of a misdemeanor is barred from being a candidate for any elective office or acting as a lobbyist for four years following the conviction.

An official action by the Council or the Mayor may also be set aside by a court if a Political Reform Act violation has occurred and the action might not have otherwise been taken had the violator disqualified himself or herself.

C. CONFLICTS OF INTEREST IN CONTRACTS (GOVERNMENT CODE §§ 1090 *et seq.*)

Dating back to the 1850's, California has codified a common law prohibition against "self dealing" in contracts. This prohibition is commonly known as "the Section 1090 prohibition" and basically provides that City officers or employees cannot be financially interested in any contract made by them in their official capacity or by the body of which they are members. A contract made in violation of Section 1090 subjects the officer or employee to a fine or imprisonment and to a perpetual disqualification from holding office in California. Moreover, a contract made in violation of Section 1090 is void.

D. CONSTITUTIONAL PROHIBITION ON PASSES OR DISCOUNTS FROM TRANSPORTATION COMPANIES: FORFEITURE OF OFFICE

The California Constitution contains a very strict prohibition against the acceptance of passes or discounts from transportation companies by public officers. California Constitution Article XII, Section 7 states:

> A transportation company may not grant free passes or discounts to anyone holding an office in this state: and the acceptance of a pass or discount by a public officer. . . shall work a forfeiture of that office. (Underlined for emphasis.)

The acceptance of such pass or discount "shall work a forfeiture" of the office held by the recipient. For this reason, public officials should be aware of this Constitutional prohibition whenever they are offered such passes or discounts.

E. DISCLOSING FINANCIAL INTERESTS IN PROPERTY WITHIN REDEVELOPMENT PROJECT AREAS

While we have devoted a section to California Redevelopment Law (Section 11), it is important to note here that the California Redevelopment Law requires disclosure compliance in addition to the annual disclosure forms required by the FPPC and filed with the City Clerk.

We must emphasize the importance of disclosure. The general rule is that persons who have direct or indirect financial interests in a project area may not participate in any decision that affects the project area. Participating in the decision can render the decision invalid. ***Further, failure to disclose constitutes misconduct in office.*** Health and Safety Code Section 33130 provides as follows:

> If any such officer or employee owns or has any direct or indirect financial interest in any property included within a project area, that officer or employee shall immediately make a written disclosure of that financial interest to the agency and the legislative body and the disclosure shall be entered on the minutes of the agency and the legislative body. Failure to make the disclosure required by this subdivision constitutes misconduct in office.

Sanctions may include removal from office, disqualification for future public office, and possible fines or imprisonment.

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SECTION 5.
LABOR RELATIONS

The vast majority of City employees are represented by employee organizations or unions. A limited number of top level management and confidential employees along with officials appointed by the Mayor or Council are not represented by employee organizations. Generally, labor relations between City employees and Council are governed by the Meyers-Milias-Brown Act ("MMBA") which is found in Government Code Sections 3500 *et seq.*

The purpose of the MMBA is to grant employees the right to form, to join, and to participate in the activities of the employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. The MMBA also gives employees the right to refuse to join or participate in employee organizations.

A. DUTIES OF THE CITY IN EMPLOYEE RELATIONS

When dealing with employee organizations, the City has a requirement to "meet and confer" with recognized bargaining groups. This meet and confer requirement mandates that the City sit down and discuss in good faith, issues regarding wages, hours and other terms and conditions of employment with representatives of recognized employee organizations. Prior to taking any action, the City must fully consider such presentations as are made by the employee organization on behalf of its members. This full consideration must be done prior to arriving at a determination of policy or a course of action on issues involving wages, hours or other terms and conditions of employment.

In order to meet and confer in good faith with employee organizations, the Council must designate its representative to meet with those representatives of recognized employee organizations. Under FMC Section 2-1906, the City Manager or his/her designee shall serve as the Council representative. Historically, the Labor Relations Manager has performed this function with representatives from the affected Departments. Both sides have the obligation to meet and confer promptly upon request of the other party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals. Each party must attempt to reach agreement on matters within the scope of representation (wages, hours and other terms and conditions of employment). The process must include adequate time for resolution of impasses where specific procedures for such resolution are contained in local rules or by mutual consent of the parties. If either side refuses to bargain in good faith, the other side must file an unfair practice charge with the Public Employment Relations Board prior to seeking judicial action to enforce the good faith bargaining requirement.

During negotiations, one common bad faith negotiating technique is to attempt to circumvent the process. At times, a union representative will contact Councilmembers directly and attempt to "negotiate" around the bargaining team chosen by the Council.

Discussions with and presentations and correspondence to a Councilmember are permissible and constitutionally protected; negotiations are not. Negotiations with Councilmembers constitute an unfair employee relations practice under Section 2-1915 of the FMC.

Another example of bad faith negotiating would be when one side enters into negotiations with no intention of listening to the other side prior to making a decision. Often, this is manifested by "take it or leave it" proposals early in the process. The key to labor negotiations are to keep an open mind throughout the process and follow those guidelines that are laid down by the Council when it establishes the negotiating parameters.

B. IMPASSE PROCEDURES

In the meet and confer process, the parties may be unable to resolve issues and reach an agreement. In these cases, procedures in the City's Employer-Employee Relations Ordinance dealing with impasses are to be followed, except IAFF (fire) and FPOA (police), with both units now having additional remedies under Senate Bill ("SB") 402 as discussed below. One method of impasse resolution is called mediation. Mediation is the voluntary process in which an outsider is brought in from the State Mediation and Conciliation Service or Federal Mediation and Conciliation Service. This mediator shuttles between the parties and attempts to get the parties to reach settlement. Mediation procedures are non-binding and at times <u>are</u> used when the parties have trouble finding a middle ground in an area in which they feel a settlement could be reached.

Another impasse procedure under the City's Employer-Employee Relations Ordinance is called "fact-finding." In a fact-finding procedure, an outside person selected by mutual agreement of the parties is often brought in to conduct an impartial investigation and determination as to facts. A report is prepared and delivered by the fact-finder to the parties in impasse.

After impasse procedures are completed, Council may take a final step without agreement called unilateral action. Unilateral action allows the Council to implement its "last, best and final offer." Unilateral action is a step that is rarely taken and should only be considered after a long negotiating process followed by failure of impasse procedures to allow agreement to be reached.

The state legislature has enacted SB 402 regarding binding interest arbitration. When an impasse has occurred with either IAFF/FPOA in a situation where either a mediator cannot be agreed upon or such mediation fails to effect settlement of the economic issues, the employee organization may request that the dispute be resolved by way of interest arbitration. In the interest arbitration system established by state law, an arbitration panel will hear evidence, receive and review the final offers or position of each party, and render a decision which effectively writes the memorandum of understanding on the unresolved economic issues. This new legislation has been challenged in litigation filed by the California League of Cities as unconstitutional. The litigation is pending resolution by the California Supreme Court.

C. MEMORANDUM OF UNDERSTANDING

Once agreement is reached by the negotiators, the agreement is put into writing in a document called a Memorandum of Understanding ("MOU"). The MOU is the basic contract between the employee organization and the City. Its term is subject to negotiation but usually covers one, two or three years.

During the term of the agreement, the City and employee organization must follow the agreements reached in the MOU in their labor negotiations. Often, the MOU will spell out procedures to deal with layoffs or other policies that may need to be implemented during the term of the agreement. To the extent that such procedures are specified in the MOU, the parties are bound by those procedures. Negotiations, during the term of an MOU, cannot be reopened without following the procedures set out in the MOU.

Once the agreement is reached between the negotiating teams, the MOU is then submitted to the respective bodies for approval. The employee organization usually holds a vote of its membership on the agreement. In addition, Council will be asked to approve the final document. Until the Council approves the final document, it will not be effective.

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SECTION 6.
CODE ENFORCEMENT

The City's Code Enforcement Division, a division of the Department of Housing, Economic and Community Development ("HECD"), is primarily responsible for enforcing the FMC. The code enforcement effort over the years was driven by citizen complaints. In recent years, the Mayor and Council have become much more proactive in their efforts to beautify the City and abate blight conditions. Thus, referrals by the Mayor and Council have increased dramatically.

In general, City staff confirm violations and attempt to resolve matters with the property owner. The City has tremendous success in obtaining compliance at the administrative level. However, there is a consistent percentage (10%+) of violations which are not quickly resolved and result in an escalation of the matter to the City Attorney's Office. Typically, the City Attorney's Office will institute legal action to obtain a court order directing the property owner to comply with the FMC or otherwise cease maintaining a public nuisance.

Historically, the City has prioritized matters involving imminent health and safety hazards as the top priority for its limited code enforcement resources. The FMC provisions which have been most frequently relied upon in the City's enforcement efforts are as follows:

- Housing - FMC Chapter 13, Article 11 regulates substandard residential buildings, wherein a condition endangers the life, health, safety, property or welfare of the public or the occupants thereof.

- Dangerous Building - FMC Chapter 13, Article 12 regulates all dangerous buildings, residential and commercial, which are dangerous or unsafe for the public or occupants.

- Public Nuisance - FMC Chapter 8, Article 9 declares certain land uses to be a public nuisance, including violations of the Zoning Ordinance.

FMC Chapter 13, Article 9 authorizes the City to enforce signage standards within the City.

- Miscellaneous Enforcement - Enforcement involving a variety of other code violations is handled by the City Attorney's Office; these include dance permits, taxicab permits, Fire Code violations, and alcohol CUP violations.

The City Attorney's Office has undertaken considerable FMC revisions to aid in code enforcement. These have been for the purpose of streamlining the process, updating the FMC to comply with state and federal law, adding new subject areas for enforcement, and coordinating the various FMC violations. The City Attorney's Office has also provided staff training and is available to provide counsel to staff.

This Office has been increasingly called upon to pursue innovative and proactive code enforcement methods. We have researched and worked closely with Council, the City Manager, Police, HECD and the Planning and Development Department in the following areas:

- Illegal Activity - Utilized state and local law along with a problem oriented policing ("POP") teams, Neighborhood Policing Officers ("NPOes"), Multi Agency Gang Enforcement Consortium ("MAGEC"), HECD staff and neighborhood groups to locate and prosecute drug houses, gang activities and prostitution.

  Prostitution/Loitering prosecutions have changed significantly from 1997. The number of prostitutes walking Fresno's streets has declined considerably since 1997. The reduction in the number of cases can be attributed primarily to two factors: (1) The number of street prostitutes has gone down substantially due to aggressive enforcement and prosecution; and (2) The police department has been very successful with the Prostitution Abatement and Rehabilitation ("PAR") and ESCAPE Programs which are diversion programs for the prostitutes and johns who are not hard core, in an attempt to get them off the streets. The aggressive enforcement effort on the street prostitutes, however, has pushed some of the prostitution activity indoors in the form of exotic dancers. At the request of the Police Department, an Exotic Dance Ordinance has been prepared by this Office and is likely to go to Council soon. Vice Intelligence is preparing a report to Council on the ordinance.

- Aggressive and Abusive Solicitations - Council has adopted an ordinance prohibiting aggressive and abusive solicitations, and solicitations in prohibited places. The ordinance prohibits, among other things, solicitations that continue after a person has declined to give money, using profanity or abusive language while soliciting, and blocking the path of a person while soliciting. The ordinance also forbids solicitations from taking place in certain sensitive areas, such as a public parking lot or within fifty feet of an ATM. The intent of the ordinance is to maintain and improve the quality of life and economic vitality of the City of Fresno while allowing the exercise of free speech guaranteed in the United States and California Constitutions. The ordinance went into effect on October 28, 2002.

- Homeless Court - The Superior Court conducted two sessions of the Homeless Court Project in the latter part of 2002. The purpose of Homeless Court is to identify indigent individuals with outstanding low-level criminal cases who are involved in rehabilitation programs sponsored by various homeless and charitable organizations. The Court, District Attorney, City Attorney, and Public Defender then work collaboratively to resolve the outstanding cases in order to enable the defendants to move forward in putting their lives on the right track and becoming contributing members of the community. The City Attorney's

Office has been involved in the project from it's inception and has participated in both sessions of Homeless Court.

- Substandard Buildings - Aided HECD in its efforts to abate substandard buildings under both state and local law.

- Cardroom Ordinance - Enforcement in this area consumes a significant amount of time as it involves state, civil, and criminal laws and the cardrooms involve intense law enforcement oversight.

- Management of Real Property Ordinance - FMC Chapter 9, Article 9 is enforced by the Chief of Police with oversight and legal action by the City Attorney's Office. It regulates habitual behavioral nuisance activity. It is designed to encourage property owners to take charge of their property so behavioral nuisances do not occur. It has been successful at getting compliance from property owners without having to resort to the legal process so far.

- Public Nuisance Ordinance - Most recently, the Council added subdivision (m) to FMC Section 9-804 declaring blighted buildings to be public nuisances. Blighted buildings are defined as vacant and in a dilapidated condition. Dilapidated conditions include buildings left in a partial state of construction and buildings boarded up for an unreasonable time. This Office is also working at present under Council direction to create a registration and monitoring program, patterned after other cities' programs, to address the worst properties in the City.

- Cost Recovery Ordinance - State law and Charter authority allow the City to recover its costs of abatement and enforcement from violators of the City's public nuisance laws. Mindful of an ability to address more code enforcement violations with increased recovery of costs, Code Enforcement requested this Office to improve the City's costs recovery abilities. This Office prepared and Council recently adopted an ordinance that added the Cost and Penalty Recovery Ordinance to the FMC at Chapter 1, Article 6. This new ordinance is intended to (1) consolidate the numerous and varied provisions in the FMC related to cost recovery; (2) simplify the procedures used to collect costs and penalties; and (3) take full advantage of the authority provided by the state and the Charter to recover costs and unpaid penalties.

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SECTION 7.
LIABILITY OF CITY OFFICIALS FOR INTENTIONAL TORTS AND CIVIL RIGHTS VIOLATIONS

This section introduces the concept of public official civil rights liability. It discusses the potential civil rights liability of officials and entities for the acts of local officials and the operations of local governmental entities. It is not intended, nor should it be used, as a complete treatment on the subject. The emphasis of this discussion is potential liability under federal civil rights theories, and the principal immunities available to local officials from federal civil rights liability.

Virtually every sphere of municipal operations can be the backdrop for a decision or action raising issues of potential civil rights liability. We hope that this brief discussion assists you, as an elected official, to understand when decisions you are entertaining and legislation and policy you are considering, may raise issues touching upon federal civil rights laws. Being so informed, you are in a better position to know when you should consult your human resources, labor relations, and legal staffs to address these issues and minimize the risk of potential civil rights liability for the City and for you.

A. GIST OF A CIVIL RIGHTS VIOLATION

Essentially, a civil rights violation may arise when a municipality, its officials or employees, deprive a person of any constitutional right or federally protected right, by any statute, ordinance, regulation, custom or usage under color of law.[45] Acting under "color of law" means acting by state or local authority, rather than as a private person.[46] A person need not specifically intend to deprive another of a federal or constitutional right to be liable - he or she need only have intended to do the improper act.[47]

B. POTENTIAL PERSONAL LIABILITY OF THE MAYOR, COUNCILMEMBERS, DEPARTMENT DIRECTORS AND OTHER CITY OFFICIALS FOR CIVIL RIGHTS VIOLATIONS

Ordinarily, Councilmembers and other local legislators acting within the traditional legislative capacity and city prosecutors acting as advocates in the criminal process are absolutely immune from liability for damages under Section 1983. Legislators act within the traditional legislative capacity when they formulate rules and policies to be

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[45] 42 U.S.C. § 1983 (sometimes cited as "§ 1983" or "section 1983"). See generally, CALIFORNIA CONTINUING EDUCATION OF THE BAR (CEB), CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE (4th Ed.) Chapter 13.

[46] *Lugar v. Edmonson Oil*, 457 U.S. 922, 102 S. Ct. 2744 (1982).

[47] *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961) (overruled on other grounds 436 U.S. 658 (1978)); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F. 3d 470 (9th Cir. 1998).

applied in all future cases (e.g., adopt ordinances, rezone property, adopt budgets for their municipality, levy taxes, adopt broad policies, adopt general plans, etc.), according to the framework established for taking such action.[48]

Most California cities operate under a City Manager form of government, where the Council selects one of its own members to act as Mayor. Such a Mayor continues to sit on the Council, usually presiding over its meetings, breaking tie votes, and executing instruments and legislation on behalf of the Council. Under such a scheme, the Mayor enjoys the same legislative immunity as other Councilmembers when the Mayor is acting within "the sphere of legitimate legislative authority."[49]

In contrast, the City of Fresno has a Mayor-Council form of government in which the Mayor does not sit on the Council. Instead, the Mayor possesses some legislative power (e.g., veto legislation, prepare and submit a budget), but primarily exercises a large measure of the executive and administrative power formerly exercised by the Council under the previous Council-Manager form of government, such as exclusive appointment and supervision of the City Manager and appointment of members to commissions and boards.[50] Consequently, Fresno's Mayor enjoys legislative immunity when exercising the Mayor's legislative power,[51] but the Mayor is not entitled to absolute legislative immunity for conduct not performed as part of the legislative function.[52]

However, a suit may still be maintained against legislators and prosecutors for declaratory or injunctive relief. Government officials performing discretionary functions generally have a qualified immunity for civil damages to the extent their conduct did not violate clearly-established statutory or constitutional rights which a reasonable person would have known.[53] A discretionary act is one as to which the actor is free to exercise judgment in determining the manner in which a duty is to be performed.

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[48] *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 520 P. 2d 29 (1974); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171 (1979); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976).

[49] *Supreme Court of Va. v. Consumers Union,* 446 U.S. 719, 732, 100 S. Ct. 1967 (1980) (relating to legislative immunities generally).

[50] See generally, Fresno City Attorney, Mayor-Council Form of Government Summary and Transition Recommendations (June 7, 1996).

[51] *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966 (1998) (mayor entitled to absolute legislative immunity for preparing and introducing budget in which plaintiff's department eliminated; councilmembers voting on budget likewise entitled to absolute legislative immunity).

[52] *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S. Ct. 2675 (1979) (issuing press release not part of legislative function); *Trevino v. Gates*, 23 F. 3d 1480 (9th Cir.) (city councilmembers' indemnification of police officers which a jury found had used unconstitutional excessive force is not legislative in character).

[53] *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982).

When little or nothing is left to the individual's judgment as to the manner in which to perform the duty, the duty is said to be ministerial. Qualified immunity is available to officials, but not their governmental entities, in the case of a challenged custom, policy or usage.

Although legislators are entitled to absolute common-law immunity for legislative acts, this immunity does not apply when acting in their administrative or executive capacities. In other words, legislators have absolute immunity against civil suits only when acting within their legislative capacities.[54]

C. ACTS WHICH MIGHT RESULT IN A CIVIL RIGHTS VIOLATION

A city is created by virtue of state law and therefore anyone acting "under color" of a city's authority acts under "color of state law" for purposes of Section 1983.[55] Action under color of state law may encompass implementation or enforcement of a municipal law, regulation, policy or custom.[56]

The following is a non-exhaustive list of situations where local governments may act or fail to act, resulting in civil rights liability:

1. Employment Discrimination.

Discrimination in hiring, firing, promotion, retention, use of certain classifications of persons or which have a disproportionate impact that operates to exclude protected classes of persons at a higher rate than others. Tests must be job related or justified by business necessity (i.e., a valid measure of job performance).[57] Tests may obviously not be scored on the basis of race, religion, national origin or color.[58]

Title VII of the Civil Rights Act of 1964 is specifically made applicable to local governments[59] and prohibits discrimination on the basis of race, color, religion,

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[54] See note 3, *supra; San Pedro, supra,* 159 F. 3d at 482.

[55] *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937, 102 S. Ct. 2744 (1982).

[56] See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra*, at §§ 13.20 and 13.21.

[57] *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849 (1971) (overruled on other grounds, as recognized in 914 F. Supp. 1257 (1996)).

[58] 42 U.S.C. § 2000e-2(1).

[59] 42 U.S.C. § 2000e-2, 2000e-3.

national origin, sex, as well as certain retaliatory acts. It also applies to job applicants as well as employees.[60]

California Constitution, Article 1, Section 8, prohibits employers from disqualifying any person from entering or pursuing a business, profession, vocation or employment because of sex, race, creed, color, national origin or ethnic origin. Proposition 209 added Section 31(a) to Article 1 of the California Constitution. Section 31(a) provides that the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[61]

The California Fair Employment and Housing Act ("FEHA") applies to all municipalities and prohibits discrimination on the basis of race, color, national origin, ancestry, sex, pregnancy, childbirth, or related medical condition, marital status, religious creed, physical and mental disability, medical condition (cancer-related or genetic characteristics), age 40 and over, and sexual orientation. Unlawful discrimination also includes the perception that an individual has any of these characteristics or that an individual is associated with a person who has, or is perceived to have, any of these characteristics.[62]

2. Pregnancy, Childbirth, and Related Medical Conditions.

The Pregnancy Act of 1978 is part of Title VII and prohibits local governments, among others, from discrimination on the basis of pregnancy, childbirth, pregnancy disability and related medical conditions.[63]

3. Sexual Harassment.

Unwelcome sexual advances or requests for sexual favors, or verbal or physical conduct of a sexual nature which interferes with a person's work performance or creates an intimidating or hostile work environment is a form of discrimination under both California and federal law.[64]

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[60] 42 U.S.C. § 2000e-2(a).

[61] Adopted by initiative November 6, 1996.

[62] Gov. Code §§ 12920 - 12927, 12940 - 12948. The FEHA applies to public employers pursuant to Government Code section 12926(d). Implementing regulations have been adopted by the Fair Employment and Housing Commission. See 2 Cal. Code of Regs. §§ 7285 *et seq.*

[63] 42 U.S.C. § 2000e-(k).

[64] 29 U.S.C. § 2000e-(a)(1); Gov. Code §§ 12940(h) and (i), and 12950.

4. Age Discrimination.

The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age for persons age 40 and over.[65]

5. Handicap Discrimination.

The Rehabilitation Act of 1973 applies to local governments receiving certain kinds of federal financial assistance and prohibits discrimination against the handicapped in programs or activities receiving federal financial assistance.[66]

6. Disability Discrimination.

The Americans with Disabilities Act ("ADA") prohibits discrimination on the basis of disability against a qualified individual with a disability in regard to virtually every aspect of the employment relationship.[67] A qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.[68]

Title I generally prohibits discrimination against a qualified individual with a disability because of such disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[69] The City is covered by the ADA's employment provisions.

7. National Origin and Citizenship.

The Immigration Reform and Control Act of 1986 prohibits discrimination based upon national origin and citizenship by employers with more than three employees.[70]

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[65] 29 U.S.C. §§ 621, *et seq.*

[66] 29 U.S.C. §§ 701-7961.

[67] 42 U.S.C. §§ 12101 *et seq*. The ADA supplements the Rehabilitation Act of 1973 (29 U.S.C. §§ 791 *et seq*).

[68] 42 U.S.C. §§ 12131, *et seq.*

[69] 42 U.S.C. § 12112. The effective date for Title I of the ADA was July 26, 1992.

[70] 8 U.S.C. § 1324b, *et seq.*

8. Protected Speech.

There is some protection for employees (although not absolute constitutional protection) who speak out on matters affecting public concern.[71]

9. Land use decisions and actions affecting private land.

Municipal decisions and actions can result in liability if they overly regulate, take or damage land or an interest in land, and thereby diminish its fair market value, without due process of law; take land without just compensation (Fifth Amendment); regulate, take or damage land based on invidiously discriminatory grounds (civil rights); or regulate, take or damage land denying the affected landowner procedural due process and equal protection (Fourteenth Amendment). In reality, all such actions can be made out as civil rights violations, since they deny the landowner a constitutionally protected right.

10. City Actions impermissibly seeking to regulate conduct.

Ordinances, resolutions, executive orders, regulations, and other actions may be set aside on civil rights claims if they are too vague to enforce, or if they prohibit both protected as well as unprotected conduct (e.g., certain vagrancy, curfew, public assembly, and other ordinances).[72]

11. Enforcement of permissible ordinances in an impermissible manner.

Similarly, otherwise valid ordinances may not be enforced in an arbitrary manner against classes of people, particularly suspect classifications. Otherwise, discriminatory ordinances must bear a rational relationship to a legitimate state purpose or, in cases of ordinances discriminating against suspect classes, must promote a compelling state interest.[73]

12. Failure to (adequately) train.

The failure to train or adequately train which amounts to deliberate indifference to the rights of persons with whom the employee comes in contact may give

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[71] *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968); *Chico Police Officers Association v. City of Chico*, 232 Cal. App. 3d 635, 283 Cal. Rptr. 610 (1991).

[72] *Connally v. General Construction*, 269 U.S. 385, 46 S. Ct. 126 (1926); *Coates v. Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686 (1971).

[73] *Weber v. City Council of Thousand Oaks*, 9 Cal. 3d 950, 513 P. 2d 601 (1973).

rise to liability.[74] This situation most often arises in the case of police officers and custodial personnel.

13. Failure to (adequately) supervise.

The failure to supervise or adequately supervise which amounts to deliberate indifference to the rights of persons with whom the employee comes in contact may give rise to liability.[75] When a history of widespread abuse puts the responsible supervisor on notice of the need for improved training or supervision and the official fails to take corrective action, the supervisor may be liable if the failure causes "constitutional" injury to others.[76]

14. Failure to intervene or prevent an act (inaction).

A local governmental entity may be liable under Section 1983 "if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights."[77]

To impose liability on a local governmental entity for failing to act to preserve constitutional rights, a Section 1983 plaintiff must establish that he or she possessed a constitutional right of which he or she was deprived, that the municipality had a policy that "amounts to deliberate indifference" to the plaintiff's constitutional right, and that the policy is the "moving force behind the constitutional violation."[78]

A person may be liable for a wrongful act by a person he or she supervises of which he or she was aware, but which he or she failed to prevent,[79] or for the wrongful act of another which he or she is capable of preventing, but fails to intervene to prevent.[80]

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74 *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989).

75 *Davis v. City of Ellensburg*, 869 F. 2d 1230 (9th Cir. 1989).

76 *Johnson v. Duffy*, 588 F. 2d 740 (9th Cir. 1978); *Fundiller v. City of Cooper City*, 777 F. 2d 1436 (11th Cir. 1985).

77 *Oviattt v. Pearce*, 954 F. 2d 1470, 1474 (9th Cir. 1992).

78 *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197 (1989).

79 *Taylor v. List*, 880 F. 2d 1040 (9th Cir. 1989).

80 *Meehan v. County of Los Angeles*, 856 F. 2d 102 (9th Cir. 1988).

15. Federal Fair Housing Act.

The Federal Fair Housing Act ("FFHA") of 1968, as amended, contains broad language barring housing practices that discriminate on the basis of race, disability, handicap, and other factors. In addition, the FFHA requires housing providers, including entities like the City who make housing rehabilitation and CDBG loans and grants, to make reasonable accommodations when necessary to afford handicapped and other persons equal opportunity to housing programs. The FFHA further prohibits discrimination in the processing review or making denial of loans.[81]

See *San Pedro* case discussed in Section B above, in which the federal court held that a claim may stand against a councilmember under the Fair Housing Act for interference and retaliation. This court explained that although the councilmember was entitled to immunity for legislative acts, he was not entitled to immunity for alleged acts of retaliation.

16. Access to facilities and services.

The ADA discussed under point 6 above, has broad implications for potential local government liability if its requirements are not observed. For example, the ADA generally requires, among other things, that: programs and services be provided in an integrated setting, unless separate or different measures are needed to ensure equal opportunity; reasonable modifications in policies, practices, and procedures that deny equal access to disabled individuals, unless fundamental alteration in the program would result; auxiliary aids and services when needed to ensure effective communication, unless an undue burden or fundamental alteration would result; and operation of city programs so that, when viewed in their entirety, they are readily accessible to and usable by individuals with disabilities.[82] Under Title II of the ADA, public entities may not discriminate against or deny access or services to any "qualified individual with a disability" when providing services, including public transportation.[83] Title II of the ADA establishes detailed requirements for accessibility and usability of public transportation vehicles, trains, or commuter rail cars and for transportation facilities or stations.[84]

Title II of the ADA also prohibits local governmental agencies from excluding qualified individuals from participating in or receiving the benefits of the entity's

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[81] 42 U.S.C. §§ 3600, *et seq.*

[82] See generally, U.S. Department of Justice, Civil Rights Division, Title II Highlights, http://www.usdoj.gov/crt/ada/t2hlt95.htm.

[83] 42 U.S.C. §§ 12131 *et seq*.

[84] 42 U.S.C. §§ 12131 *et seq.*; see also 28 C.F.R. §§ 35.101 - 35.190.

services, programs or activities on the basis of a disability.[85] The regulations prohibit discrimination on the basis of disability in employment under any service, program or activity conducted by a public entity.[86] This section arguably protects disabled individuals applying for or participating in volunteer activities with cities, such as volunteer fire and police programs.

Both general law and charter cities are prohibited from purchasing rapid transit equipment which is not accessible to individuals with disabilities.[87] If state law prescribes higher accessibility standards than federal law, state legislation has expressly provided that state law requirements must be followed.[88]

The First Amendment precludes a local government from taking sides in elections by making public facilities available to only one side. Once a public forum has been established, free speech and equal protection principles prohibit discrimination based solely on content or subject matter.[89]

D. THE CONSEQUENCES TO AN OFFICIAL OR A CITY OF BEING FOUND LIABLE FOR A CIVIL RIGHTS VIOLATION

If the City loses a civil rights lawsuit, it may be liable to the successful plaintiff for compensatory damages. Where the harm is continuing or will take place in the future, the court may issue an injunction and/or a declaration that the local governmental action, policy or decision violates the civil rights law. Punitive damages may also be awarded, in addition to compensatory, declaratory and injunctive relief.[90] Finally, plaintiffs are typically awarded attorneys fees, often in significant amounts.[91]

A public official or employee who is found liable for a civil rights violation is entitled to indemnification for compensatory damages.[92] To receive indemnification, the official or employee must request indemnification in writing before trial, obtain the City's defense of the claim and reasonably cooperate in good faith in the defense of the

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[85] 42 U.S.C. § 12132.

[86] 28 C.F.R. § 35.140.

[87] Gov. Code § 4500(a).

[88] Gov. Code § 4500(b).

[89] *Lehman v. City of Shaker Heights*, 418 U.S. 298, 315-316, 94 S. Ct. 2714 (1974).

[90] *Martinez v. Procunier*, 354 F. Supp. 1092 (1973), aff'd 416 U.S. 396 (1974) (overruled on other grounds, as recognized in 802 F. Supp. 606 (1992)).

[91] 42 U.S.C. § 1988.

[92] Gov. Code §§ 825 *et seq*.; *Williams v. Horvath*, 16 Cal. 3d 834, 843, 548 P. 2d 1125 (1976) (distinguished on other grounds 105 Cal. App. 3d 876 (1980)).

action.[93] Even where a conflict between the City and the official may arise, the City may be required to indemnify the employee or official subject to a written reservation of rights. However, where defense of the official would create "an actual and specific conflict of interest," then the City may refuse to provide a defense.[94] The City may even indemnify the official or employee for punitive damages, if the Council makes findings that it is in the best interests of the City to do so.[95] The findings may only be made after a judgment has been rendered in the case.

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[93] Gov. Code § 825(a). Public entities must defend employees and former employees in civil actions if the employee's act or omission was within the scope of his employment, the employee did not act with actual fraud, corruption or actual malice and the defense of the action would not create a specific conflict of interest between the entity and the employee. (Gov. Code §§ 995 and 995.2.) Special rules regarding indemnification of elected officials who tortiously interfere in a judicial proceeding, commit an intentional tort not directly related to the official's performance of official duties or violate specified Government Code and Penal Code sections relating to official misconduct are found in Government Code §§ 815.3, 825(f) and 825.6.

[94] Gov. Code § 995.2.

[95] Gov. Code § 825.

SECTION 8.
PROCUREMENT CONTRACTS

This section is intended as general legal guidance as to assist in consideration and deliberations on procurement contracts.

A. ADVERTISED COMPETITIVE BIDDING

Charter Section 1208 requires competitive bidding on contracts involving the expenditure of more than $100,000[96] for "materials, supplies, equipment or for any public work of improvement." The Charter requires that this amount be adjusted annually in response to the National Consumer Price Index ("CPI"). The Charter also requires Council to adopt an ordinance defining "public work of improvement."

In March 2002, the voters approved a number of amendments to Section 1208 of the Charter. The most significant changes include the increase in the threshold amount requiring competitive bidding to the $100,000 amount noted above, authorizing design build projects in lieu of competitive bidding pursuant to ordinance, and authorizing Council to adopt an ordinance to establish methods for determining the lowest bid when alternative bid forms or additive/deductive items are included in bid specifications. Staff and this Office are currently drafting ordinances consistent with this new Charter authority.

Under Section 1208, Council "may reject any and all bids presented and may readvertise in its discretion." Section 1208 further requires that when contracts are awarded thereunder, they "shall be let to the lowest responsive and responsible bidder." A "responsive bidder" is one who complies with all the requirements of the specifications. However, a bid which departs from plans and specifications in certain details but proposes a performance substantially conforming to the City's needs may be sufficient if Council determines that such departure constitutes a "minor irregularity." A minor irregularity is one which does not deprive the City of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, is of such a nature that it does not adversely affect competitive bidding by giving a bidder a substantial advantage over other bidders, thereby restricting or stifling competition.[97]

The interpretation of the term "responsible bidder" is of critical importance in any discussion concerning competitive bids. A line of cases dating back to 1915 has construed this term as precluding a decision-making body from imposing any

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[96] FMC § 3-105 requires such competitive bidding for expenditures over $32,000 (after CPI adjustments). An ordinance implementing the new Charter amount is forthcoming.

[97] MCQUILLAN MUNICIPAL CORPORATIONS § 29.65 (3d Ed.).

conditions external to "lowest and responsible."[98] In *Neal*, the governing board had adopted a resolution directing departments to award all jobs for printing to union offices.

While the term "lowest" is easily understood, a general discussion of the term "responsible" is necessary. The most recent California Supreme case on this subject provides:

> It bears emphasis that the word "responsible" in the context of the statute is not necessarily employed in the sense of a bidder who is trustworthy so that a finding of nonresponsibility connotes untrustworthiness. Rather, while that term includes the attribute of trustworthiness, it also has reference to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work. Thus, a contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e., not qualified to do the particular work under consideration. [W]e hold that the contract for a public construction project must be awarded to the lowest monetary bidder . . . unless it is found that the lowest bidder is not responsible, in the sense defined above. There is no basis for the application of a relative superiority concept under that section.[99]

The court in *Inglewood* went on to hold that before a public works contract is awarded to other than the lowest monetary bidder, the public body must notify the lowest bidder of any evidence reflecting upon its responsibility, afford that bidder an opportunity to rebut such adverse evidence, and permit such bidder to present evidence that it is qualified to perform the contract.[100]

Charter Section 1208 allows for an exemption to the requirement of awarding the contract to the lowest responsive and responsible bidder. Council may adopt an ordinance extending local businesses up to a 5% preference. On November 11, 1996, Council adopted such an ordinance which provides that local businesses bidding City contracts under $50,000 for materials, supplies, and/or equipment will receive a 5% preference whenever the bid amount of the lowest responsive and responsible bidder is less than or equal to $250,000. Local businesses bidding City contracts for public works construction will receive a 0.5% preference when the amount of the preference does not exceed $1,000.[101]

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[98] *Neal Publishing Company v. Rolph,* 169 Cal. 190 (1915).

[99] *City of Inglewood-L.A.County Civic Center Auth. v. Superior Court*, 7 Cal. 3d 861, at 867 (1972) (emphasis added).

[100] The Council has adopted Resolution No. 2001-52 establishing procedures for appeals and debarment in the competitive bidding process.

[101] FMC § 3-105(h).

There are exceptions to competitive bidding that are handled by Council resolution. Charter Section 1208 permits Council to forego advertising for bids, "if such purchase shall be deemed by a super majority of the Council to be of urgent necessity for the preservation of life, health or property . . . ." Also, advertised competitive bidding is not required when the work to be done or the goods to be supplied can only be provided by one source since there is no possibility for real competition.[102] This is known as the sole source exception. A work of improvement obtained through a design-build process is exempt from competitive bidding, if such process is established by ordinance.

B. CONTRACTS NOT REQUIRING ADVERTISED COMPETITIVE BIDDING

FMC Section 3-109, as amended by Ordinance No. 2001-6, effective March 15, 2001, authorizes the Purchasing Manager to contract for all public works construction, equipment, materials, or supplies for which an appropriation has been made and competitive bidding is not required by Charter. It is the duty of the Purchasing Agent to use his/her best efforts to secure the lowest price.[103]

The newly amended Section 3-109 also authorizes the City Manager, or his/her designee, to contract for all services (except legal services) required by the City for which an appropriation has been made, including professional services, provided the contract involves an expenditure of City monies of less than or equal to $50,000.

FMC Section 3-109 was again amended by Ordinance No. 2002-25, effective June 16, 2002, to require that the City Manager establish an Administrative Order[104] setting forth criteria and procedures for the selection of consultants (except attorneys) by an objective process.

Requests for Proposals (“RFP”) for services are generally utilized by the City but are not mandated by Charter or ordinance. In practice, most contracts for services are let pursuant to an RFP process. Contract awards made pursuant to RFPs are not subject to "lowest responsive and responsible bidder" and usually allow for negotiation of contract terms.

Currently, Section 3-109.1 of the FMC provides primary preference to local firms and a secondary preference to non-local firms associated with local firms when contracting for consulting and other professional services. Finally, Council adopted an ordinance on November 11, 1996 permitting the purchasing agent to extend a preference to local businesses in the purchase of materials, supplies, equipment and/or public works

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[102] *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348 (1930).

[103] FMC § 3-103.

[104] Administrative Order 6-19 was established by the City Manager.

construction for which advertised bidding is not required, provided the preference is applied in the same manner as that prescribed for advertised competitive bidding.[105]

C. REDEVELOPMENT AGENCY CONTRACTS

Article 43.1 of the Local Agency Public Construction Act[106] sets forth the competitive bidding requirements for contracts awarded by redevelopment agencies. Section 20688.2 provides:

> Any work of grading, clearing, demolition, or construction undertaken by the agency shall be done by contract after competitive bids if the cost of such work exceeds the amount specified in Section 37902 of the Government Code, as that section presently exists or may be hereafter amended. With respect to work of grading, clearing, demolition, or construction which is not in excess of such amount, the agency may contract the work without competitive bids, and in contracting such work may give priority to the residents of such redevelopment project areas and to persons displaced from such areas as a result of redevelopment activities.

Government Code Section 37902, referenced in the above quotation, was repealed in 1982 and reclassified in Public Contract Code Section 20162. The monetary amount stated in this section is $5,000. Thus, work of grading, clearing, demolition, or construction undertaken by the Redevelopment Agency of the City of Fresno ("Agency") shall require competitive bidding if the cost of such work exceeds $5,000.

We recognize that as a charter city, Fresno does not have to comply with state competitive bidding laws on projects that constitutes "municipal affairs." However, the City has elected to establish its own competitive bidding requirements.[107] The exemption of charter city contracts from state competitive bidding requirements sometimes lead to the misconception that this exemption would also apply to contracts awarded by a redevelopment agency. Currently, there is no body of law to support this conclusion.

The authority to establish a redevelopment agency and the authority for the agency to function as a redevelopment agency is granted by the Community Redevelopment Law of the State of California.[108] Redevelopment agencies are, therefore, creations of the state and must abide by state law.

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[105] FMC § 3-101.

[106] Public Contract Code §§ 20688.1 - 20688.4.

[107] Charter § 1208 and FMC Chapter 3, Article 1.

[108] Health and Safety Code §§ 33000 *et seq.*

Community redevelopment is of statewide concern and preempted by the state legislature. Community Redevelopment Law specifically states that:

> For these reasons it is declared to be a policy of the state:
>
> . . . (c) That the redevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are governmental functions of state concern in the interest of health, safety, and welfare of the people of the State and of the communities in which the areas exist.[109]

Consistent with the state's intention to preempt the field in the area of redevelopment, the $5,000 limit for redevelopment agency contracts as set forth in Public Contract Code Section 20688.2 is the controlling statutory limit.

On March 11, 1997, the Agency adopted Resolution No. 1449 establishing bylaws for the Agency. The City's purchasing agent is the officer in charge of the Agency's purchasing function, and may contract for all services, work, equipment, materials or supplies the Agency requires.[110] The Agency is to conduct its business according to rules and regulations applicable to the City's business, unless provided otherwise by statute.

D. PROHIBITION OF PROJECT LABOR AGREEMENTS

Project labor agreements, also known as "prehire agreements," are defined as "collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees."[111]

On February 8, 2000, Council adopted an ordinance prohibiting in any City contract for the construction, maintenance, repair, or improvement of public works, a requirement that a contractor, subcontractor, or material supplier, or carrier engaged in the construction, maintenance, repair, or improvement of public works, execute or otherwise become party to any project labor agreement, collective bargaining agreement, prehire agreement, or other agreement with employees, their representatives, or any labor organization as a condition of bidding, negotiating, being

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[109] Health and Safety Code § 33037 (emphasis added).

[110] Redevelopment Agency Bylaws Article II, Section 7.

[111] *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.,* 507 U.S. 218, 122 L. Ed. 2d 565,578, 113 S. Ct. 1190 (1993) (*Boston Harbor*).

awarded, or performing work on a public works contract. "Public works" is defined in the ordinance to mean a building, road, street, sewer, storm drain, water system, irrigation system, reclamation project, redevelopment project, or other facility owned or to be owned or to be contracted for by the City of Fresno or the Redevelopment Agency of the City of Fresno, that is paid for in whole or in part with tax revenue paid by residents of the City of Fresno; or any other construction service or nonconstruction service.[112]

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[112] FMC § 3-109.2.

SECTION 9.
COMPENSATION, REIMBURSEMENT OF EXPENSES FOR ELECTIVE OFFICERS, AND USE OF PUBLIC FUNDS

A. COMPENSATION OF ELECTIVE OFFICES

By Charter, the Council shall establish the compensation of City elective officers by ordinance.[113] Once compensation is fixed, it cannot be increased or diminished during an elective officer's term of office. In accordance with the Charter, Council adopted Ordinance No. 2000-49 (attached as an exhibit). Ordinance No. 2000-49 designated the Civil Service Board to review and study the City's elective officers' compensation every two years starting in 2002, and to recommend to the Council, any changes in the amount of compensation. Presently, compensation is fixed at $99,360.00 for the Mayor, $44,510.50 for Councilmembers, and $49,680 for the Council President.

B. USE OF PUBLIC FUNDS

The use of public funds by elective officers begins with the premise that public funds must be used for authorized public purposes. In an early case, the California Supreme Court stated: "officials are not free to spend public funds for any 'political purpose' they may choose, but must use appropriated funds in accordance with the legislatively designated purpose."[114] The Charter[115] also prohibits officers and employees from using City equipment, City staff, City premises, or other City resources for political purposes.

Once a public purpose is established, there must be legal authority to expend. The legal authority to expend is set forth in Resolution No. 95-112 (attached as an exhibit). For some time, we have recommended to Council, the Mayor and staff that this resolution be updated. At this time, we have scheduled a meeting with the Controller and her staff to review current practices and to commence the process of updating Resolution No. 95-112, which includes amounts that appear to be outdated, and references to Administrative Instruction Orders, that has been superseded by the Administrative Order Manual. Any revision will be taken to the Council for action. The current resolution authorizes elective officers to receive reimbursement for Council authorized travel and other necessary expenses when on official duty according to standard City reimbursement procedures and policies. Reimbursement is allowed for only those expenses associated with carrying out official City business. Thus, public funds cannot be used for campaign purposes absent clear legislative authority, or be used for personal purposes.

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[113] Charter § 308.

[114] *Mines v. Del Valle,* 201 Cal. 273 (1927).

[115] Charter § 813.

C. MASS MAILINGS AT PUBLIC EXPENSE

Elected officials must necessarily communicate with their constituents. However, the Political Reform Act discussed above in the Conflict of Interest Section has stringent rules regarding mass mailings sent at public expense.

The Political Reform Act provides: "No newsletter or other mass mailing shall be sent at public expense."[116] The FPPC adopted Regulation 18901 to implement the statutory provision. Regulation 18901(a)[117] provides that a mailing is prohibited only if all the following apply:

(1) The item sent is tangible and *delivered,* by any means, to the recipient at his/her residence, place of employment or business, or post office box.

(2) The items sent either:

a. *Features* an elective officer affiliated with the agency with produces or sends the mailing, or

b. *Includes the name, office, photograph, or other reference to an elected officer* affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

(3) a. Any of the costs of distribution is paid for with *public moneys*: or

b. Costs of design, production, or printing exceeding $50.00 are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

(4) *More than two hundred* substantially similar items are sent, in a single calendar month.

We urge you to be extremely careful with your mailings and contact the FPPC or this Office if you have any doubt as to whether a mailer is appropriate.

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[116] Gov. Code § 89001.

[117] 2 Cal. Code Regs. § 18901.

D. MISUSE OF PUBLIC FUNDS

Violations of the laws prohibiting misuse of public funds may subject a violator to criminal and civil sanctions, including imprisonment and a bar from holding elective office. Individuals who improperly use public resources may be required to reimburse the City for the value of the resources used and may have to pay their own attorney's fees, in addition to the attorney's fees of the individual challenging the use of resources.[118] Misuse of public funds for campaign purposes may also give rise to reporting requirements under the Political Reform Act, and additional penalties for failure to comply with such reporting requirements.

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[118] *Tenwolde v. County of San Diego*, 14 Cal. App. 4th 1083 (1993).

SECTION 10.
LAND USE, URBAN GROWTH AND PLANNING LAW

INTRODUCTION

Along with budget management and the provision of police and sanitary services, land use control is often seen as among a city's most elementary functions. Elected officials are charged with the responsibility of determining what the landscape looks like, where specific activities can locate, and how potentially conflicting activities can coexist within a limited geographic area. Land use review also represents a very complex area of the law.

A. PREEMPTION

Before discussing the adoption and implementation of plans and zoning ordinances, it is helpful to note that most planning and zoning issues are a "municipal affair" and subject only to City resolution; certain other matters, however, have been either reserved or declared preempted under state and federal statutes.

A locally important urban planning-related preempted area is in annexations. The rate at which the City expands geographically is determined pursuant to processes under state law. All annexations of land to the City are reviewed and approved by the Local Area Formation Commission ("LAFCO"). Each county has its own LAFCO. In Fresno County, both the board composition and annexation proposal processes are statutorily established. LAFCO is important to planning in Fresno because LAFCO must approve the City's sphere of influence, or eventual, probable growth boundaries.

B. PLAN ADOPTION AND IMPLEMENTATION

At the heart of land use planning is the adoption and implementation of general, community and specific plans.[119] Adherence to plans is important, not only to achieve planning goals, but also to comply with legal requirements that certain land use, public works, and funding decisions be made consistent with adopted plans. State law directly governs some planning-related decisions. Fresno has also adopted its own ordinance governing procedures for the adoption of administration of the General Plan and other plan documents, known as the Local Planning and Procedures Ordinance ("LPPO").[120]

1. Plan Hierarchy.

There are three basic "levels" of plans in Fresno:

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[119] Gov. Code §§ 65300, *et seq*. & 65803.

[120] Found at Article 6 of the Zoning Ordinance (FMC Chapter 12).

(a) General Plan.

The City is required to have a general plan under the state Planning and Zoning Law.[121]

(1) Blueprint for Physical Development.

The general plan is an overall statement, or blueprint, of the physical development of a community. State law requires that each city's general plan be "comprehensive, long-term" and for the physical development "of the community."[122] The general plan must cover all incorporated territory and should go beyond the city limits to include any land outside city boundaries "which . . . bears relation to its planning."

(2) Maps and Text.

The general plan sets forth its policies in two formats, both graphically and textually. Both formats provide operable policies; a provision is still binding regardless of its format. The most commonly referenced map is the Land Use Diagram. The Land Use Diagram is a map (generated using the City's Geographic Information Systems software program) of the entire City, setting forth land use designations for each parcel. The designations specify intended classes and intensities of use. Additionally, the plan text sets forth what are generally called the "plan policies"; this is a term often applied generically to apply interchangeably to what are actually three separate, major types of plan text provisions; plan goals or objectives; policies which implement those goals and objectives; and, implementation measures and *criteria*, which are usually, but not always, more specific than policies.

(b) Community Plans.

Community plans are considered "intermediate level" plans. Community plans cover particular areas of the City and, generally include detailed and neighborhood policies. Examples are the Edison Community Plan and the Woodward Park Community Plan. As with the General Plan, community plans set forth their planning policies both graphically and textually.

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[121] Gov. Code §§ 65300, *et seq*.

[122] Gov. Code § 65300.

(c) Specific Plans.

Specific Plans, such as the Tower District Specific Plan and Fulton/ Lowell Specific Plan, are the most localized and detailed of all of the plans. They often include specific design criteria. As with the General Plan and community plans, policies in specific plans are set forth both graphically and textually.

2. Plan Consistency.

Most actions the City takes in the area of site development, public works, and redevelopment cannot be legally completed unless a consistency finding is made as to the General Plan or the applicable community or specific plan. The California Supreme Court has characterized the general plan as a city's "constitution for all future development."[123] In Fresno, as in most large cities, the same can be said of community and specific plans. The City's LPPO expressly requires rezones, maps, variances, and conditional use permits to be consistent with relevant plan policies. Additionally, state law requires that capital improvement, including such activities as road widening, bike lanes, and street vacations, be consistent with the general plan.[124] Also, the Subdivision Map Act expressly requires all tentative and parcel maps to be consistent with the General Plan.

3. "Amendments" versus "Updates."

Plan amendments are specific modifications, usually proposed in connection with a specific project, to the land use diagrams or text of the General Plan or one of the community or specific plans. A plan update, however, is usually more broad-reaching in scope and not tied to a particular project but rather updates the entire General Plan.

4. Plan Amendment Procedures.

Plan amendments may be initiated by any one of four mechanisms: Council or Planning Commission resolution; the Planning and Development Director's written action; or, by application of the property owner or representative.[125] By practice and Council policy, the Planning and Development Department assures that each proposal is submitted to the local citizen's plan committee, which will discuss the proposal with staff and the applicant and make an advisory recommendation to the Planning Commission and Council. The Planning Commission must then hold a hearing on the amendment and make a

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[123] *Citizens of Goleta Valley v. County of Santa Barbara*, 52 Cal. 3d 553 (1990).

[124] *Friends of B Street v. City of Hayward*, 106 Cal. App. 3d 988 (1980).

[125] FMC § 12-606.A.

recommendation on the same to the Council. The Council's decision on the plan amendment is final.[126] The FMC prohibits an applicant whose plan amendment has been denied from reapplying for "substantially the same" amendment within one year from the date of the denial.[127]

C. ZONING AND REZONES

1. Definition/ Description.

Zoning is a tool to implement adopted plans. Under the most basic definition of zoning:

> Zoning is simply the division of a city into districts and the prescription and application of different regulations in each district. These zoning regulations are generally divided into two classes: (1) those which regulate the height or bulk of buildings within certain designated districts --- in other words, those regulations which have to do with structural and architectural design of the buildings and (2) those which prescribe the use to which buildings within certain designated districts may be put.[128]

2. Zoning Ordinance, Official Zone Map and Regulations.

The City's Zoning Ordinance is set forth in Chapter 12 of the FMC. The Zoning Ordinance, like the General Plan and each of the community and specific plans, consists of both a map and text. The City's Official Zoning Map, maintained by the Planning and Development Department, is incorporated into the FMC. The text sets forth the zoning regulations. Each parcel in the City limits is assigned a zoning district. The term "rezone," as applied to any given parcel, technically refers to any change in the district which is reflected for the given parcel on the Zoning Map. The Zoning Ordinance, with the associated map, sets forth regulations which are legally enforceable against land uses.

3. Development Standards.

The FMC applies the term "development standards" to describe those zoning regulations which set forth basic architectural design of buildings and site layout. Development standards include, but are not limited to, setback, building height, landscaping and minimum parking space requirements. The

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[126] FMC § 12-609.B.3.

[127] FMC § 12-606.E.

[128] Longtin, CALIFORNIA LAND USE, § 3.02[1], summarizing *Miller v. Board of Public Works*, 195 Cal. 477, 486 (1925) (emphasis added).

FMC also provides for a large number of districts organized into general use categories (such as residential or industrial), which are then broken into separate districts (such as R-1, R-2, R-3).

4. Listed Uses.

Each district is broken into separate lists which enumerate permitted, conditionally permitted, or prohibited uses or activities.

(a) Permitted Uses.

The core character of each district is defined by its list of permitted uses. Provided the physical facilities for a proposed development conform to regulations such as height, setback and parking, it is in most cases irrelevant that the City or a neighbor feels that the particular use proposed is not consistent with its surroundings. For this reason, permitted uses are often referred to in Fresno as uses "by-right."[129] Property transactions and investments are often based on permitted uses.

(b) Conditional Uses.

The second type of listed uses in each district are conditionally permitted uses. These uses and activities are permitted only where the City has issued a conditional use permit. They are uses which the Council has found may, but only on a case-by-case basis, be found to be consistent with a particular zoning district and neighborhood.

(c) Prohibited Uses.

Some uses and activities, called "prohibited uses," are expressly prohibited in each district.

5. Director-Classified Uses.

It is difficult - if not impossible - to classify and list each use that could potentially be made of property in the City of Fresno. In addition to the listed permitted, conditional, and prohibited uses - all of which Council establishes by ordinance - the FMC delegates authority to the Planning and Development Director to classify unlisted uses through a process known as the Director's Classification. Applicants who wish to undertake an activity that staff cannot identify as being included among the Council-approved listed uses in the

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[129] To some degree the term "by right" is a misnomer because nothing can be automatic if discretion still needs to be exercised in order to find compliance with zoning regulations. In a few, rare, instances, site plans can be denied for permitted uses where there is substantial evidence of actual, imminent harm to neighbors as a consequence of the site plan approval.

applicable zoning district may apply for a classification without undergoing a rezone process. Thereafter, future proposed activities which fit the Planning and Development Director's classification may occupy a site as authorized by the Planning and Development Director.

6. Police Power.

The Council's authority to zone is based on the City's police power. This authority is very broad and empowers the City to determine what the City will look like, what types of amenities there are, and how activities are arranged in the urban landscape. Numerous cases could be cited to illustrate the breadth of the Council's authority in zoning. To give just one important example, a land use restriction with no purpose other than to improve the appearance of the streetscape, has been repeatedly upheld as a substantial government goal; it is only in the manner in which such restriction is applied that is subject to the court's review.[130]

7. Forms of Zoning in Fresno.

The forms of zoning provided for under the FMC are:

(a) Conventional Zoning.

Most properties are covered under so-called conventional zoning districts. This simply means that the only regulations which apply to the particular site are those set forth in the Zoning Ordinance.

(b) Conditional Zoning.

The FMC and state law also authorize conditions to be placed on rezones. This is called conditional zoning. Under this zoning, Council imposes conditions on a zoning approval which often relate to such matters as restricting the types of activities that would otherwise be allowed under the district regulations, or modifying the development conditions. For example, Council may delete alcohol sales from the list of conditionally permitted uses otherwise allowable on the property under the district regulations. Or, Council may require a larger setback to adjust the street appearance of the property. These conditions are just as valid and effective against the property as are any other district regulations. They are made official by execution of a zoning contract which the property owner signs and is recorded. The zone district sign for properties under conditional zoning include the suffix of "/cz."

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[130] *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981)

(c) Overlay Districts.

Although not a different type of zoning, note that the FMC provides for several overlay zoning districts. These include the "BA" (Boulevard setback) and "BP" (Bluff Preservation) overlay districts. Each overlay district has its own regulations. Properties subject to these overlays are subject also to underlying district regulations.

(d) Planned Community and Planned Unit Development.

Other zoning mechanisms provided for under the FMC are the Planned Community ("PC") and Planned Unit Development ("PD") zoning mechanisms. Each has its own, detailed regulations in separate FMC sections.

(1) Planned Community ("PC").

The purpose of the PC district is to give the City and developer substantial flexibility in choosing among development tools and standards in planning for larger projects. The Dominion Community in Woodward Park was approved under a PC.

(2) Planned Development ("PD").

A PD project is typically on a much smaller scale than a PC and development is pursued under a Conditional Use Permit. PD approval retains the property's conventional zoning district and does not involve a zoning change. It is analogous to a PC in that it provides for some flexibility not offered by conventional zoning and development standards

8. Plan consistency.

Zoning actions must be consistent with the General Plan or any applicable community or specific plan. Any zoning action - - whether it be a rezone or a text amendment - - must be consistent with an operable plan, including maps, diagrams, and textual goals and policies.

9. Zoning Procedures.

Like plan amendments, rezones affecting particular parcels may be initiated by Council or Planning Commission resolution, by the Planning and Development Director's written action, or by application of the property owner or representative.[131] As with plan amendments, the Planning and Development Department submits rezone proposals to the local citizen's plan committee,

[131] FMC §§ 12-401.A, 12-403.A.

which will discuss the proposal with staff and the applicant and make a recommendation to the Planning Commission and Council. The Planning Commission must then hold a hearing and make a recommendation to the Council, which the Council is required to consider as a part of its deliberations. The Council's decision on a rezone application is final.[132] The FMC prohibits reinitialization of a denied rezone matter "within one year from the date of the final action denying or disapproving the matter." [133] The exception is where the "action [denying the proposal] was specifically stated to be without prejudice."[134]

D. SPECIAL PERMITS

"Special Permit" is the term the FMC uses to refer to any of three basic types of actions which provide a mechanism for reviewing the details of a proposed development: the conditional use permit, site plan, and variance.

1. Substantial Evidence Requirement.

Perhaps the most important, overriding consideration for any decisionmaker in reviewing a special permit proposal is that the action taken requires the decisionmaker to make certain required findings which are based on substantial evidence. All special permit actions -- whether permit approvals or denials -- must be supported by findings based on substantial evidence to be legally defensible.

(a) Quasi-judicial actions.

All three of the special permit types provided for under the FMC are quasi-judicial actions: stated simply, the review and hearing processes of special permits are closer to judicial proceedings than are plan amendments and rezones, which are legislative actions.

(b) Findings.

The FMC sets forth separate, distinct findings for each special permit. Findings must be express and on-the-record. Councilmembers, Planning Commissioners, and staff must be intimately familiar with the required findings. The findings for each of the special permits are set forth at FMC Section12-405. Failure to make the findings to support a special permit may be legally fatal to the permit.[135]

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[132] FMC § 12-403.H.

[133] FMC § 12-401.I.1.

[134] FMC § 12-401.I.1.

[135] *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974).

(c) Substantial Evidence.

In making each required finding, the decisionmaker must be confident that the analysis both tracks the FMC's language and is based on substantial evidence. Generally defined, substantial evidence is evidence which is factually based, is concrete, objective, credible, and reliable.

2. Site Plan.

The Site Plan is the most commonly issued of the special permits. The findings for the permit are limited primarily, though not exclusively, to the project's physical design, architectural appearance, landscaping, signage, and consistency with development standards.

3. Conditional Use Permits.

Conditional Use Permits ("CUPs") are required for land uses which the Council has determined need to be carefully reviewed for consistency with surrounding uses on a case-by-case basis. Conditionally permitted uses are not necessarily noxious or inherently inconsistent with the underlying zoning district. Findings are similar to those of the site plan, but are broader in scope in that the location of the use is up for consideration with each permit. Also, project conditions tend to be more broadly based in the range of subjects addressed, and include, in addition to the site development parameters considered in site plan review, such issues as noise, traffic, and hours of operation.

4. Variances.

The variance, unlike the CUP or site plan, is considered a form of "zoning relief." It is considered an extraordinary remedy. It is only available when the strict application of FMC provisions (typically, development standards such as setbacks) will cause a hardship upon the property owner which is not experienced by other property owners. Before approving of a variance, the decisionmaker must find both that there are circumstances relating to the property amounting to a hardship upon the owner if the variance is not granted, and that the issuance will also not constitute a privilege not shared by others.

5. Plan Consistency.

The FMC expressly requires that every CUP and variance be consistent with an operable plan. The FMC does not include site plans or building permits within the FMC's express consistency requirement; however, staff and the City Attorney's Office strongly discourage approval of site plans which authorize structures or completion of developments which are plainly inconsistent with plan policies such as architectural guidelines; in such cases, a CEQA issue may be implicated and it will be difficult to find on the basis of substantial evidence that the permit does not result in harm to surrounding properties.

6. Conditions of Approval.

At the heart of every special permit, and structuring the City's approval of each, are the permit's conditions of approval. The conditions of approval are key to defining the extent to which the City decides in any given case to exercise its authority of a land use. They are substantially akin to the terms of a contract. The wording is important. Each permit, and its conditions of approval, run with the land and cannot be made to expire on the basis of property transfer.

E. SUBDIVISIONS

Subdivision planning is a highly technical subject area involving a complex interplay of land use and real property law and civil engineering. State law preempts many of the procedures and substantive requirements for subdivisions. We limit our discussion solely to those map issues arising in the public hearing process.

1. Map Required for All Subdivisions.

As a general rule, the California Subdivision Map Act requires that either a parcel map or tentative map is required before undertaking any real estate transaction which will result in the division of land into separate units, or parcels, for the purpose of sale, lease or financing. The Zoning Ordinance[136] contains two articles governing map processes. An approved map divides the landscape into different parcels which are delineated by a subdivision map which memorializes the official lots of record for title purposes at the County Recorder's office.

(a) Land Use Planning Tool.

The courts have declared that an overriding purpose of the Subdivision Map Act is to give local authorities maximum control over the design of subdivisions and uses of land. Subdivision maps are one of the main vehicles the City uses to implement its various planning policies and regulations. As with special permits, each map is accompanied by detailed conditions of approval which define the extent of the City chooses control over the land use. Also as with both rezones and special permits, every subdivision map must be consistent with the operable plans.

(b) Types of Maps.

Subject to limited exceptions, both a tentative map and a final subdivision map are required for every subdivision which creates five or more parcels. However, only a single parcel map is required for any subdivision of four parcels or less. Sometimes applicants opt for both a

[136] FMC Chapter 12.

tentative and final parcel map. Vesting tentative maps and vesting tentative parcel maps are also authorized and allow the developer to "freeze" development standards and conditions of approval.

(c) Exemptions.

There are several exemptions, the most significant of which are conveyances of land to and from the City and agricultural, industrial, commercial and residential apartment building leases (in practice, this means most leases are exempt). Condominium and cooperative developments are, however, subject to mapping requirements. Lot line adjustments are allowed without a map because they do not create new parcels.

(d) Map Agreements.

Most maps involve the creation of substantial improvements, such as streets, sidewalks, landscaping and other fundamental code-required improvements. Subdivision Map Agreements and Parcel Map Agreements provide a means by which the developer posts bonds and commits to installing the improvements under the agreement's terms after the filing of a final map.

2. Subdivision Review Process.

(a) Hearings and Appeals.

The Planning and Development Director approves all parcel maps without a hearing; however, the Planning and Development Director's decision is subject to appeal to the Planning Commission, and the Planning Commission's decision subject to appeal to the Council. The Planning Commission approves all tentative maps, which are then subject to appeal to the Council. Staff approves modifications subject to notification of the same to the Commission. Like special permits, subdivision map proceedings entail quasi-judicial decisionmaking and can be either approved or denied only when supported by findings based on substantial evidence. Unlike special permits, there is no mechanism in the FMC by which the Council can refer a tentative map to itself in the absence of an appeal.

(b) Scope of Final Map Approval.

Once a tentative map is approved, a final map package is assembled for Council approval. The package includes the final map and any Subdivision Agreement entered into with the developer (see above) and any associated agreements. Final maps are ordinarily placed on the consent calendar. The overriding issue before the Council when acting on a final map is whether final map is in substantial compliance with the

tentative map. It is important to remember that rarely can Council impose additional conditions on a final map that were not imposed at the tentative map stage. Generally, provided the final map is substantially compliant with the conditions of approval of the tentative map, the Council must approve the final map.

F. LAND USE PROCESS, GENERALLY

Other than with respect to the specific FMC-required hearing and appeals processes outlined above, following is a brief summary of some of the more significant procedural issues that regularly arise.

1. Rules Governing Hearing Processes.

Four sources of law generally govern the conduct of Council and Planning Commission hearings on land use matter: the Zoning Ordinance; the Brown Act;[137] Council bylaws and Planning Commission Rules and Regulations; and Constitutional Due Process.

2. Constitutional Due Process.

In addition to Planning Commission Rules and Regulations and the Brown Act, Constitutional Due Process applies at public hearings in certain land use matters.[138] A significant consideration is the type of project application which is being considered. Generally, legislative actions (plan amendments and rezones) do not implicate due process procedures. In contrast, quasi-judicial actions, such as the special permits described above do. The California Supreme Court has stated that conditional use permits "involve entirely different constitutional considerations" from rezones.[139]

(a) Notice and Opportunity to Be Heard.

Where a special permit or subdivision map is to be heard, due process, including a reasonable opportunity to be heard, must be provided to project neighbors.[140] Generically, the formula for adequate constitutional due process entails the following: 1) notice of pending action; and 2) a reasonable opportunity to be heard at a fair hearing.

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[137] Guidebook (See Section 2).

[138] *Horn v. Ventura County,* 24 Cal. 3d 605, 619 (1979).

[139] *Horn, supra,* 24 Cal. 3d at 619.

[140] *Horn, supra*, 24 Cal. 3d at 619.

(b) Unbiased Decisionmaker.

Another key consideration in any land use proceeding is the need to remain unbiased. This is especially the case for quasi-judicial actions, such as special permits (described above). Due process requires, generally, that the decisionmaker approach each hearing with an open mind, and that the decision be based on the information and facts discussed at the hearing. To accomplish this requirement, decisionmakers must not have a personal, financial interest in the outcome of a matter, nor should the decisionmaker become embroiled in the controversy of a matter.[141] Additionally, ex parte contacts -- that is, off-the-record discussions between the decisionmaker and one interested party – are, in principle, prohibited in quasi-judicial proceedings. In practice, this principle does not bar Councilmembers or Planning Commissioners from visiting a project site or otherwise investigating the facts of a project first-hand. However, facts which are crucial to decision – such as might form the decisionmaker's basis for approving or denying a conditional use permit – should be stated on-the-record. Please see Guidebook Sections 2 and 4. As a general rule, every decision should be approached with a fresh mind, free of influences which might affect objectivity. One rule of thumb for assuring consistency and objectivity in decision-making is to adhere to the facts, to required Code findings, to applicable plan policies, and to the law.

3. Required Votes and Tie Votes.

With only a few exceptions, a land use action is accomplished by a motion supported by a majority of those decisionmakers present to act on the matter (that is, a minimum of four Councilmembers or Planning Commissioners, or three if only four are present to act). If a motion is made to approve the project, and that motion fails, the project is disapproved and matter is concluded. The issue of tie votes occasionally arises. The general rule is that a tie vote results in the failure of Council or the Planning Commission to enact, grant, or approve a Project and therefore, constitutes a denial of the matter.[142]

4. Mayor's Veto Authority.

The Mayor's veto authority does not extend to special permits, to maps, to rezones, to parcel-specific plan amendments, or amendments to specific policies in plan text. However, the Mayor may veto zoning ordinance text

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[141] See Guidebook Section 4 for further discussion on Conflicts of Interest.

[142] See FMC § 12-401-E.

amendments and plan adoptions (including initial adoptions and re-adoptions) and plan updates.[143]

G. TAKINGS AND EXACTIONS (PROJECT CONDITIONS AND FEES)

1. Takings.

The United States and California Constitutions prohibit the government from "taking" property for public purposes without "just compensation." This means that government cannot use its zoning authority to inversely condemn property in order to avoid the expense of instituting eminent domain proceedings and paying for the property. This is a very complex area of constitutional law. The essential test is whether the government's actions deprive an owner of substantially all economically viable use of the subject property. The underlying philosophy is that the constitution bars government from making a private property owner suffer the burdens of a public improvement which the public as a whole should shoulder. Of course, merely restricting allowable uses or development on a site, or the amount of profits an owner can make, will not, in and of itself, amount to a taking. For this reason, keeping property zoned at the very low-density residential zoning found in the rural parts of Fresno does not amount to a taking; economically viable use can still be made by developing the property at the allowable, rural density. There is also no taking where development is prohibited because to allow it would create a public nuisance. At the other end of the spectrum, however, barring all development on a site – such as by downzoning property to an "open space" district without allowing any development – may amount to a taking because under such a district the owner may not be able to make any economically viable use of the site.

2. Land Use Exactions (Project Conditions and Fees).

Land use exactions - - in the form of project conditions or mitigation fees -- are the chief means by which the City assures that land uses are consistent with the surrounding community. These exactions are subject to takings rules.

(a) Forms in Fresno.

Project conditions are imposed in the following forms: for plan amendments, in the resolution or ordinance adopting the amendment; in a conditional rezone, in the approving rezone ordinance and zoning contract; in special permits and maps, in the conditions of approval. Conditions may include: a requirement to dedicate land (such as is needed to widen a street abutting the project site); a requirement to construct an improvement (such as to install a traffic signal); or to pay a fee (such as a UGM sewer facilities fee).

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[143] See Charter § 605 and discussion in and attachments to Guidebook Section 1.

(b) "Nexus."

As a general rule, with respect to project-specific conditions, there must be a reasonable relationship between the project's impacts; a reasonable relationship is defined by what the courts call the essential nexus and rough proportionality between a condition and project impacts.

(1) *Dolan* Test.

Any requirement that the land be reserved or set aside for a specific purpose amounts to a possessory dedication of real property which the United States Supreme Court has held is subject to heightened scrutiny under a particular test devised by that court.[144] In *Dolan v. City of Tigard ("Dolan"),*[145] the essence of the U.S. Supreme Court's test was set forth as follows:

> . . . we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. [Citation omitted.] If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of

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[144] *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1988); *Ehrlich v. Culver City*, 12 Cal. 4th 854 (1996). In *Ehrlich*, the California Supreme Court explained the Supreme Court's rationale for imposing "heightened" judicial scrutiny as follows:

> [T]he heightened standard of scrutiny is triggered by a relatively narrow class of land use cases-those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation. Neither *Nollan* nor *Dolan is*, after all, a conventional regulatory takings case. Rather, as the court's rationale for its result in *Nollan* demonstrates, both are cases in which the local government attached a condition to the issuance of a development permit which, but for the claim that the exaction is justified by the greater power to deny a permit altogether, would have amounted to an uncompensated requisition of private property.
>
> As Justice Scalia's opinion in *Nollan, supra*, 483 U.S. 825, makes clear, such a discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation. In such a context, the heightened *Nollan-Dolan* standard of scrutiny works to dispel such concerns by assuring a constitutionally sufficient link between ends and means. It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*. (*Ehrlich*, 12 Cal. 4th at 868-869.)

[145] 512 U.S. 374, 129 L. Ed. 2d 854, 114 S. Ct. 2309 (1994).

> the proposed development.[146]. . . We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development . . [n]o precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication . . . .[147]

(2) Development Fees.

Fees can be imposed only by following procedures set forth in the Mitigation Fee Act,[148] which the California Supreme Court has held requires as much constitutional scrutiny by the courts as do land dedications.

(3) The Test.

For any project exaction, regardless of form, there must be:

(i) A legitimate city interest in the purpose of the condition;

(ii) An essential nexus between the city's interest and the condition;

(iii) A roughly proportionate connection between the condition imposed and the project's impacts.

(c) Fact-Based Analysis.

Before imposing any condition, the decisionmaker must be assured that the facts in the record support the determination. Conditions imposed in connection with rezones are not necessarily quasi-judicial. Nonetheless, decisionmakers are advised to support any condition imposed in connection with a rezone with substantial evidence of the rough proportionality between the project's impacts and the conditions. Assuming the City is able to find the essential nexus, the City must make

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[146] 512 U.S. at 380.

[147] *Dolan, supra*, 512 U.S. at 391 and 395.

[148] Government Code §§ 66000, *et seq*.

an individualized determination that the specific condition being imposed is implicated by the project.[149] Under *Dolan*, rough proportionality requires that there be more than just the essential nexus, but also enough facts demonstrating that the value, size, amount or degree of the condition is caused by the specific proposal being reviewed. In *Dolan*, the U.S. Supreme Court struck down a requirement that a hardware store owner dedicate land for a bicycle path in order to offset what the city in that case found "could" be traffic impacts generated by the development; the Court dismissed the city's general recitation of project traffic trip figures and street capacities, calling such analysis "conclusory."

(d) Legislative Property Development Standards.

The California Supreme Court has upheld requirements cities impose upon developers to adhere to basic development standards, such as requirements to build sidewalks or to adhere to setbacks.[150] If the conditions apply to all property owners in a district, no rough proportionality analysis is required.

3. Excessive Dedications.

The City has utilized the Urban Growth Management ("UGM") review process as a means of lawfully imposing what are sometimes called "excessive dedications" upon developments occurring in areas where not all infrastructure is yet developed. These are conditions that would ordinarily be evaluated as being above and beyond what exceeds the impacts of the particular project, but which are imposed because other, subsequent developers and projects that will benefit from the infrastructure will be required to contribute their "fair share" of the cost of the infrastructure into the UGM fund. These collected monies are then returned to the developer who fronted the costs of the facilities.

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[149] *Dolan, supra*, 512 U.S. at 391.

[150] *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

SECTION 11.
CALIFORNIA REDEVELOPMENT LAW

This section describes the general powers of any California redevelopment agency, describes the City of Fresno Redevelopment Agency ("Agency"), describes the redevelopment plan adoption process, and some basic redevelopment activities, such as selecting developers, assisting private and public redevelopment projects, acquiring and disposing property, financing redevelopment, and meeting low and moderate-income housing responsibilities.

A. GENERAL POWERS OF A REDEVELOPMENT AGENCY

1. A redevelopment agency is a state agency, exercising local governmental functions, and deriving its authority and power from state law.

A redevelopment agency is a creature of statute - a state agency exercising local governmental functions. It is a legal entity distinct from its sponsoring community, having its own assets, income, and obligations. Its authority and powers are derived from the California Community Redevelopment Law (the "CRL").[151] Its jurisdictional boundaries are the same as its sponsoring community.

b. An agency must account to the local legislative body and to the state, and is subject to many of the same laws and regulations as other public entities.

An agency must account locally and to the state for its activities. It must prepare an annual financial report, present it to the local legislative body, and file the report with the State Controller that describes the agency's financial condition and a summary of its activities during the prior year, including its use of Housing Set Aside Funds.[152]

Agency activities are subject to many of the same laws and regulations that apply to other public entity activities. An agency is also subject to local laws and regulations that may be unique to the sponsoring community. An agency must present its proposed activities and transactions to certain reviewing bodies for recommendation, approval, or adoption. Reviewing bodies include the

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[151] Health and Safety Code §§ 33000 - 34160, and related statutes.

[152] Twenty percent of the tax increments allocated to the Agency from increased property valuations in a Project Area are set aside for low and moderate housing activities. Under SB 211, chaptered October 2001, and effective January 2002, this percentage goes up to 30 percent for any plan, adopted before December 31, 1993, that the Agency amends to extend the plan effectiveness or to extend the time to receive tax increment and pay debt.

agency's governing body, the local legislative body, project area committees ("PACS"), and the community's planning body or commission.

3. An agency has general corporate or business powers, powers to assist public and private redevelopment projects, and broad powers for increasing, improving, and preserving low and moderate income housing.

An agency may appoint officers, acquire, sell, and lease property to private parties, contract for public works projects in a redevelopment project area, prepare redevelopment sites, rehabilitate property, manage acquired property until it disposes of it for redevelopment, and review development actions for consistency with redevelopment plans. It is obligated to use Housing Set Aside Funds to increase, improve, and preserve the community supply of low and moderate income housing. An agency has the power of eminent domain when provided for in the redevelopment plan.

4. An agency carries out its basic objective, blight elimination, and the bulk of its activities within redevelopment project areas.

The primary objective of redevelopment agencies is to eliminate blight. An agency generally carries out its powers within the geographical confines of survey areas covered by redevelopment plans ("Project Areas") that the local legislative body adopts by ordinance. Project Areas must be in urbanized areas and be blighted, as that term is defined in the CRL. Agency activities outside Project Areas primarily relate to housing and public improvements.

B. THE CITY OF FRESNO REDEVELOPMENT AGENCY

1. The Council is the Agency's governing board, and the Housing and Community Development Commission serves as an advisory body.

An agency's governing board may be a separate agency, the sponsoring community's legislative body, or a separate community development commission. For the Agency, the Council serves as the governing board (the "Agency Board").

All matters of business associated with or required for administering a redevelopment project, or which are within the Agency's powers and require final Agency Board action, must first be presented to the Housing and Community Development Commission ("HCDC"). The HCDC functions as a community redevelopment commission or advisory body.[153]

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[153] FMC § 17-202.

2. In addition to state law, the Agency is governed by its bylaws, City ordinances, Council resolutions and ordinances, and administrative orders that do not conflict with the CRL.

The CRL is the primary body of law governing the Agency. The Agency is also subject to local law, regulations, and rules that are consistent with the CRL. Bylaws, adopted by the Agency Board, require the Agency to conduct all its business according to the rules and regulations that govern City business, whether in the Charter, the Fresno Municipal Code, in Council resolutions or other applicable law.

3. The Agency operates with an appointed Director, assigned City staff, Agency staff, and contract personnel.

The Agency Board appoints the Executive Director, who is responsible for carrying out the policies of the Agency Board. The Agency has limited direct staff, and several contract staff members. Under a 1997 agreement with the Agency, the City assigns City staff to a Redevelopment Support Division of the City Manager's Office. The Division is managed by the Agency Administrator, who reports to the City Manager. The Administrator and staff help carry out redevelopment programs that the Director institutes and the Agency Board approves. The Agency reimburses the City for salary and benefit costs of Redevelopment Support Division staff. In addition, the Agency contracts with the Fresno Revitalization Corporation for staff services.

4. The Agency Board approves an annual budget for the Agency's activities within eighteen adopted Project Areas.

The Agency prepares an annual budget that the Agency Board reviews and adopts. This budget is separate from the City budget, and is not subject to Mayoral veto. Line items in the City budget which relate to Agency matters, however, are subject to the Mayoral veto.

Agency redevelopment activities are primarily carried out within the Agency's eighteen Project Areas.[154]

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[154] (1) Roeding Business Park Redevelopment Project Area, (2) Fresno Air Terminal Redevelopment Project Area, (3) Central Business District Project Urban Renewal Area, (4) Southwest Fresno General Neighborhood Renewal Area Urban Renewal Project Area, (5) Convention Center Redevelopment Project Area, (6) Fulton Redevelopment Project Area, (7) Chinatown Expanded Redevelopment Project Area, (8) Jefferson Area Redevelopment Plan Area, (9) Fruit/Church Redevelopment Project Area, (10) West Fresno Project I Urban Renewal Project Area, (11) West Fresno Project II Urban Renewal Project Area, (12) West Fresno Project III Urban Renewal Project Area, (13) Mariposa Project Urban Renewal Project Area, (14) South Van Ness Industrial Redevelopment Project Area, (15) Central City Commercial Revitalization Project Area, (16) Airport Area Revitalization Redevelopment Project, (17) South Fresno Industrial Revitalization Redevelopment Project, and (18) Southeast Fresno Revitalization Redevelopment Project.

C. ADOPTING REDEVELOPMENT PLANS

1. The plan adoption process is statutorily mandated. The focus is blight elimination.

The CRL establishes a statutory process for adopting redevelopment plans. Council initiates the process by resolution and ultimately adopts the ordinance approving a redevelopment plan. The primary focus is blight elimination. The initial process includes the following:

- Designating a survey area for a feasibility study.

- A feasibility study that focuses on blighting conditions within the survey area boundaries, potential land uses, market demand, and financial feasibility.

- Determining blight - the survey area must have physical and economic blighting conditions, and be predominantly urbanized.

  ➜ Physical blight includes unsafe buildings, adjacent incompatible uses, and subdivided lots of irregular shape and inadequate size.

  ➜ Economic blight includes depreciated or stagnant property, abnormally high business vacancies, a lack of necessary commercial facilities, residential overcrowding, and a high crime rate.

  ➜ "Predominantly urbanized," means that at least 80 percent of the land in the survey area, must either be developed or have been developed for urban uses, or be an integral part of one or more areas developed for urban uses and surrounded or substantially surrounded by land that has been developed for urban uses.

2. Affected taxing entities,[155] affected property owners and tenants, participate in the process.

If the study determines that a redevelopment project area is feasible, the Planning Commission designates the survey area, the Agency and Planning Commission prepare a preliminary plan that the Agency Board accepts, and a lengthy review and comment review period begins, that includes the following:

- The Agency notifies affected taxing agencies, and the State Board of Equalization of its intent to adopt a redevelopment plan.

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[155] Those taxing entities which receive taxes derived from property within the Project Area.

- The County's fiscal officer and the State Board of Equalization prepare a report to the Agency on the assessed valuation of taxable property within the proposed project area.

- The Agency prepares a preliminary report to all affected taxing agencies, identifying the blighting conditions, the scope and purpose of the redevelopment plan, and how the Agency will alleviate the blighting conditions.

- A PAC may be required.

  ➜ If the proposed plan gives the Agency eminent domain authority applicable to property on which anyone resides, and a substantial number of low or moderate income persons live within the project area, a PAC is required.

  ➜ If the proposed plan contains one or more public projects that will displace a substantial number of low or moderate income persons, a PAC is required.

  ➜ If a PAC is required, the Council calls on the residents, tenants, and existing community organizations in the proposed project area to form a PAC, and establishes procedures governing PAC formation and member selection.

- The HCDC, and the Planning Commission review the plan and submit a report and recommendation to the Council.

3. The Council, by ordinance, adopts a redevelopment plan at a noticed public hearing, after considering recommendations from the reviewing bodies, and all evidence, including public testimony.

After receiving the reports and recommendations of the reviewing bodies, the Agency Board and Council consider the plan at a noticed joint public hearing,[156] and the Council adopts the approving ordinance. The process includes the following:

- At the hearing, the Agency presents a report to Council that includes, among other things, an environmental impact report, and a five-year implementation plan showing how the Agency intends to carry out the redevelopment plan. The report explains why private enterprise acting alone or the Council, using financing other than tax increments, cannot

[156] In addition to noticing the hearing, if any property in the project area would be subject to acquisition whether by purchase or condemnation, the Agency must send a statement to that effect to each property assessee with the notice of hearing. The Agency may attach a list or map of the properties that will be subject to acquisition or condemnation under the plan.

reasonably be expected to accomplish redevelopment in the project area and eliminate blight.

- If affected property owners or taxing entities submit written objections, the Council must address the objections in detail and give reasons for not accepting the objections.

- Council adopts the approving ordinance by a majority vote, unless the Planning Commission or the PAC recommends against approval, then adoption requires a two-thirds vote of the entire Council.

- After adoption, the City Clerk sends a copy of the ordinance to the Agency, and records notice of the adopted plan, with a legal description of the Project Area, in the Official Records of Fresno County.[157]

After plan adoption, and using substantially the same process, the Council and Agency may amend the redevelopment plan and, for financial purposes, may merge the redevelopment Project Area with one or more other redevelopment Project Areas. The Agency is charged with carrying out the adopted plan.

D. IMPLEMENTING THE REDEVELOPMENT PLAN

1. Owner/Tenant participation.

Property owners may participate in redevelopment ("owner participation") within the Project Area. The Agency must extend reasonable preferences to displaced businesses who wish to reenter business within the Project Area. Participation and preference are governed by Agency-adopted owner participation and preference rules that define participants, methods of participating, limitations on participation, factors given priority in considering participation, and the procedure for submitting participation proposals.

2. Property acquisition.

(a) Voluntary acquisition

The Agency may acquire property within a Project Area by any voluntary means, such as negotiated purchase, gift, or bequest. If the Council approves the action, the Agency may begin acquiring property after the Planning Commission formulates the preliminary plan and before the Council adopts the redevelopment plan. After plan adoption, the Agency does not need Council approval to acquire property. All property acquisitions must be for redevelopment purposes.

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[157] This puts all property owners within the project area on record notice of the plan.

In negotiated purchases, the Agency usually appraises the property first, and offers to purchase the property at fair market value (not less than the appraised value). If an owner offers to sell property to the Agency for a price, even a price less than fair market value, the Agency may acquire the property at the offered price. An appraisal is still beneficial to ascertain that the Agency is not paying too much for the property and, thereby, making a gift of or wasting public funds. **The Agency may not acquire property from its members or officers, unless the acquisition is by eminent domain**.

(b) Eminent Domain.

The Agency may acquire property by eminent domain if the adopted redevelopment plan provides for eminent domain. Generally, a plan will limit any eminent domain authority to a 12-year period that may be extended by a plan amendment. In exercising its eminent domain powers, the Agency must strictly comply with the California Eminent Domain Law[158] and the CRL. Its eminent domain powers may be restricted by the redevelopment plan, and are subject to the Project Area owner participation rules and preference rights.

The Agency must take care when exercising eminent domain powers to avoid inverse condemnation charges. If the Agency announces its intent to condemn property and then unreasonably delays the action, or takes unreasonable action before condemnation, it may be liable for damages in inverse condemnation. In certain circumstances where the Agency has condemnation powers, it may be subject to inverse condemnation charges for failing to timely respond to an owner's offer to sell his/her property to the Agency for fair market value.

3. Relocation.

When the Agency acquires occupied property, it generally must provide state mandated relocation assistance and pay relocation benefits to persons displaced from the property.[159] This Agency responsibility also applies when a developer acquires occupied property pursuant to an agreement with the Agency. By agreement, however, the Agency may require the developer to reimburse the Agency for relocation payments.

State regulations require the Agency to prepare a relocation plan specific to the project soon after the Agency initiates negotiations to acquire property and

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[158] California Code of Civil Procedure §§ 1230.010 *et seq.*

[159] Gov. Code §§ 7260 *et seq.* and California Health & Safety Code § 33415. If the project involves any federal money, then the Agency must also comply with federal relocation assistance and payment requirements.

before proceeding with any phase of a project that will displace persons. The relocation plan determines the needs of the persons being displaced, the available replacement housing, projects the dates that persons will be displaced, and estimates the Agency's costs for providing relocation assistance and payments.

4. Replacement Housing Plan.

When a project will cause removal of low and moderate income housing from the market, the Agency must also adopt a replacement housing plan. The plan must include the general location of replacement housing, show how the housing will be financed, contain a finding that the replacement housing does not require voter approval under State Constitution Article XXXIV, state the number of replacement dwelling units planned, and the time table for carrying out the plan.

5. Property disposition.

Generally, Agency disposal of acquired property must be for redevelopment purposes. Disposition may include selecting a developer or an owner participant, entering an exclusive negotiations agreement, entering an owner participation or a disposition and development agreement, and obtaining Council and/or Agency Board approval of the transaction. Approval may include hearings, reports,[160] resolutions, and findings. The Agency may dispose of property for less than its acquisition costs, and for less than a fair market value. If it does, it must justify the land right down.[161] When the Agency sells or leases property it must also obligate the purchaser or lessee to comply with nondiscrimination laws and limitations or restrictions of the CRL.

(a) Selecting a developer.

The Agency need not use a competitive process to select a developer or owner participant. The Agency may negotiate with a single developer, or may send out requests for qualifications or requests for proposal. The Agency may choose to use a master developer or to use multiple developers.

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[160] For example, see Health & Safety Code § 33433. To sell or lease property for development that the Agency acquired directly or indirectly with tax increment, the Agency must prepare a report, and make the report and the proposed agreement with the developer available for public review under § 33433. The Council considers the agreement and the property disposition at a noticed public hearing and must make certain findings, including that the consideration for the property is not less than the fair reuse value of the property, considering the use, the covenants, conditions, and criteria imposed under the agreement. Agency controls that affect property value may include imposing a specific use, limitations on design, a requirement that the project be begun and completed within a specific time, or other limitations or affirmative acts specific to the project.

[161] See footnote 14, *infra*. Land write down can be viewed as an indirect use of public monies, triggering prevailing wage requirements.

If a project requires land assembly, the Agency must comply with its owner participation and business preference rules. Failure to comply with these rules can have serious legal consequences.

(b) Agreements with developers.

The agreement between the developer and the Agency for a project will depend on the circumstances, the developer, and the project. Before the Agency Board and/or Council approve it, the agreement may be subject to review by a PAC, other community organizations, and the HCDC, and to other public review, noticed hearings,[162] reports, findings, and compliance with CEQA. If the Agency sells or leases property, the agreement must obligate the purchaser or lessee to comply with nondiscrimination laws and must contain limitations or restrictions set forth in the CRL. Developer-Agency agreements may include the following:

- Exclusive negotiations agreement. Used to identify bench marks, requirements, and conditions that each party must meet, establishes time lines, permits terminating negotiations upon certain performance failures, and may require the developer to put up a good faith deposit.

- Disposition and development agreement. Used when the Agency will acquire and/or transfer property to the developer. It defines the developer's obligations to construct a project, and the time within which the developer must complete the project.

- Owner participation agreement. Used when the developer is a property owner, agreeing to improve or develop the owner's property.

- A development lease. Usually long-term agreements where the Agency leases improved property for substantial rehabilitation, or leases vacant property for development.

[162] For instance, if the Agency is agreeing to dispose of property it acquired directly or indirectly with tax increment, it must comply with Health & Safety Code § 33433, including preparing a special report, and present evidence to Council on which it will make certain findings

(c) Agency assistance.[163]

The Agency may assist private and public developers in a variety of ways,[164] including site assembly, land right down consistent with project economics, site preparation, relocation, demolition, off-site public improvements,[165] shared use facilities, public financing, commercial rehabilitation loans, industrial/manufacturing equipment loans, and cleaning up contaminated property.[166]

4. Public improvements[167] and other assistance.

The Agency may assist or provide public improvements and other improvements within a Project Area, and subject to the limitations and procedural requirements of the CRL. Some of the circumstances, limitations, and procedural requirements are as follows:

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[163] Recent legislation affects the scope and effect of Agency assistance. Under SB 211 (adopted 2001), Health & Safety Code § 33333.10, redevelopment agencies with "significant remaining blight" may extend their time limits 10 years under certain qualifying conditions. During the 10-year extension an agency may spend tax increment only in that part of the project area identified in the report to council as having blighted parcels, and any area identified as containing necessary and essential parcels for plan purposes. (Health & Safety Code § 33333.10(e).) The State Department of Finance, Department of Housing and Community Development and the Attorney General have oversight authority.

[164] The passage of SB 975 (2001) significantly expanded the definition of public works and the application of the state prevailing wage requirements. The bill expanded the definition of public funds to cause more public/private projects to be subject prevailing wages. The potential added cost will be a factor in virtually all Agency/private developer projects. A clean up bill, SB 972 (2002) excludes certain housing projects from certain public works and prevailing wage laws.

[165] With some limitations, the Agency may pay all or part of the land value or cost of installing or constructing any building facility structure or other improvement that will be publicly owned, if it follows the procedures, obtains the consent, and the Council makes the findings required in Health & Safety Code § 33445. If the public improvements are improvements that a developer would otherwise be required to provide, the Council must consent to the Agency installation. (Health & Safety Code § 33421.1.)

[166] Redevelopment agencies have certain authority to clean up or pay for cleaning up contaminated sites within a Project Area under the Polanco Act (the "Act"). Subject to following the Act's complex provisions, the Agency may clean up contaminated property and in return the Agency, the property developer, and subsequent owners may receive limited immunity from further clean up liability

[167] The Agency is subject to the provisions of the Public Contract Code requiring competitive bidding if the Agency spends in excess of $5,000. If the contract is less than $5,000, the Agency need not competitively bid the contract, and may give priority to residents within the Project Area or to persons displaced from the Project Area as a result of redevelopment activities.

- Public improvements.

  ➜ The public improvement must be generally or specifically described in the redevelopment plan if the plan or plan amendment adding territory was adopted after October 1, 1976.[168]

  ➜ It must be linked to blight elimination.

  ➜ It must primarily benefit the Project Area.

  ➜ If the Agency is paying any land value for, and the cost of installing or constructing, any facility, structure or other improvement that will be publicly owned, the action is subject to Council determinations or findings,[169] and a report and noticed public hearing may be required.[170]

  ➜ If the owner or operator of the site would otherwise be obliged to provide the public facilities, the Council must consent to the Agency expenditure, and the public improvements must be necessary for carrying out the redevelopment plan.

- Other Improvements. The Agency may do the following:

  ➜ Construct and lease school buildings to a school district, with title vesting in the school district at lease termination.

  ➜ Construct foundations, platforms or other structures that provide for using air rights sites for structures or buildings, the uses of which are permitted under the redevelopment plan.

- The Agency may not do the following:

  ➜ Pay the normal maintenance and operations costs of public improvements.

  ➜ Use tax increments, directly or indirectly, to pay for constructing or rehabilitating a building that will be used as a city hall or county administration building.[171]

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[168] Health & Safety Code § 33445(b).

[169] Health & Safety Code § 33445.

[170] Health & Safety Code § 33679.

[171] Some very limited exceptions exist.

➜ Provide any direct assistance to an automobile dealership on land not previously developed for urban purposes.

➜ Assist a development on five acres or more if the land has not been previously developed for urban use and, after development, the property will generate sales taxes, unless the principal use is for office, hotel, manufacturing, or industrial.

E. AGENCY INCOME AND FINANCING (DEBT)

The Agency's primary source of income is tax increments. To receive tax increments, the Agency must incur debt. It creates debt by financing redevelopment activities and contracting to provide project assistance to developers.

1. Tax increments.

Tax increments are the Agency's primary source of revenue, and primary financing tool. Tax increments are property tax revenues generated from increases in assessed value resulting from redevelopment and other activities in the Project Area. Assembly Bill ("AB") 1290 established a formula for allocating taxes to the affected taxing entities, including the City. The City may elect to receive an amount equal to 25 percent of the City's proportionate share of the tax increments that the Agency receives, after deducting the 20 percent Housing Set Aside. The County of Fresno levies and collects property taxes, and before paying tax increments to the Agency, deducts a proportionate share of the County's costs for assessing, collecting, and allocating tax increments.[172]

(a) Conditions to receiving tax increments.

For the Agency to receive tax increments from a Project Area, the redevelopment plan must specifically provide for tax increment financing, and the Agency must incur debt. The Agency incurs debt by borrowing money, accepting advances, issuing tax allocation bonds, entering reimbursement agreements, entering disposition and development and owner participation agreements, or incurring other debt to carry out the redevelopment plan.

(b) Spending tax increments.

The Agency must expend tax increments for redevelopment purposes that primarily benefit the Project Area. The Agency may not use tax increments to pay for employee or contractual services of any local governmental agency, unless these services directly relate to redevelopment purposes.

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[172] Revenue and Tax Code § 97.

2. Assessment or community facilities districts.

Notwithstanding the Agency's power to help with public improvements, it may not form an assessment district or community facilities district to provide infrastructure. The Agency may agree to help pay the special taxes levied against benefitted private lands and developments under an agreement with property owners or developers. For the Agency to pay or reimburse special taxes, it must follow the same procedures that apply to public improvements, and the expenditure is subject to the same limitations.

3. Bond financing.

The Agency may sell bonds, such as tax allocation bonds, secured by the pledge of net tax increments (net of certain obligations such as Housing Set Aside, and the County's tax administration fees). The Agency may finance activities through lease revenue bonds or certificates of participation where the lease payments from the City or the Agency equal or pay the debt service.

4. Other.

Other sources of redevelopment financing may include, without limitation, borrowing from lenders and developers, developer advances, land sale proceeds, and loans from the City or other public resources.

F. RESIDENTIAL REDEVELOPMENT

1. City/Agency Interaction.

The Agency follows the CRL and consistent local law in providing affordable housing through use of available tax increment funding. Assisted projects may be subject to federal, state and local requirements of general application including advertised bidding and prevailing wages. Effective January 1, 2002 California broadened its definition of public works projects subject to prevailing wage. Residential redevelopment activities assisted with indirect subsidies and not subject to state law prevailing wage under the prior law may now need to pay a state law prevailing wage unless within an express statutory exemption.

The City, through its Department of HECD, provides complementary but independent affordable housing assistance through use of federal funding, largely HUD HOME Program and CDBG monies.

2. Tax Increment "20 Percent" Funds ("TI").

Not less than 20 percent of all taxes which are allocated to the Agency shall be used by the Agency for the purposes of increasing, improving, and preserving the community's supply of low and moderate income housing within the jurisdiction of the Agency unless the Agency can makes specific statutory finding that such funding is not required.

TI cannot be used to assist households with incomes exceeding 120 percent of area median.

TI funds must be held in a separate Low and Moderate Income Housing Fund until used.

3. Objective is to provide low and moderate income housing available at affordable housing cost.

TI funds may be expended only in furtherance of affordable housing stock, i.e., applied to an affordable housing program/Project Area consonant with the Housing Element of the City's General Plan, the Agency's annual report, and the five year Implementation Plan. An exception exists where the Agency can factually support the absence of a need for such application in the community. The Housing Element must identify and discuss existing and projected housing needs and include a statement of goals, policies, objectives, resources and projects. The Implementation Plan must be consistent with the Housing Element, specifically address the Low and Moderate Income Housing Fund and the Agency's responsibilities as to affordable housing, and be subject to periodic review.

4. Allowable Uses for TI.

An Agency may, in order to provide housing available to and for occupancy by persons and families of low or moderate income, inside or outside any Project Area (i) acquire land, (ii) donate land, (iii) improve sites, (iv) construct or rehabilitate structures, (v) provide subsidies to, or for the benefit of, low and moderate income households, (vi) develop plans, (vii) maintain the community's supply of mobile homes, and (viii) meet replacement housing obligations. TI is meant to be used only where private and/or commercial financing is unavailable.

5. Affordability Controls are Placed on the Housing Units produced.

Affordability restrictions are placed upon properties assisted with TI. These restrictions generally run with the land by recorded covenant for the "longest feasible period" but not less than 55 years for assisted rental housing and 45 years for assisted owner occupied housing. A statutory preference is given to persons and families displaced by a redevelopment project.

6. Project Area Housing Production Requirements ("Inclusionary Housing.")

30 percent of housing developed or rehabilitated by the Agency itself within a Project Area must be available at affordable housing cost to low and moderate income households, and 50 percent of these units must be for very low income households.

15 percent of housing developed or rehabilitated by other than the Agency must be affordable to low and moderate income households, and 40 percent of these units must be for very low income households.

Production requirement must be met every 10 years.

7. Off-Site Improvements.

In furtherance of affordable housing stock, the Agency may improve a program/ project site with off-site improvement if either (i) the improvements are made as part of a program which results in the new construction or rehabilitation of affordable housing units for low or moderate income persons that are directly benefitted by the improvements or (ii) the Agency finds that the improvements are necessary to eliminate a specific condition that jeopardizes the health or safety of existing low or moderate income residents.

8. Spending TI Outside of Project Area.

TI may be used outside a Project Area only upon a resolution adopted by the Agency and the Council to the effect that a specific affordable housing project will benefit from such expenditure.

9. Excess Surplus TI.

"Excess surplus" TI exists to the extent unencumbered and unexpended TI exceeds the greater of $1,000,000 or the total amount deposited in the Agency's Housing Fund during the preceding 4 years.

If the Agency allows an excess surplus, it opens itself up to sanctions that may include restrictions upon expenditure on non-affordable housing redevelopment activities and requirements that non-20 Percent TI (i.e., portions of Agency's 80 percent TI) be used for affordable housing purposes.

10. Reporting and Monitoring.

The Agency must report annually to the State Controller on housing activities including use of TI and include an independent audit. The report must include information regarding relocation and replacement activities, housing units destroyed, acquired and rehabilitated, the status of the Agency's (TI) Housing Fund, information reported by owners/occupants regarding any violation of affordability covenants, and the total amount of TI spend on administrative activities.

11. AB 1290 Implementation Plan.

The Agency's AB 1290 Implementation Plan must include an AB 315 Project Area Housing Production Plan ("AB 315 Plan"). The AB 315 Plan must be prepared for each Project Area and must be consistent with, and may be

included within, the Housing Element of the General Plan. The AB 315 Plan must include total new and rehabilitated units, and units that will meet Project Area Housing Production Requirements, as well as related strategies and programs.

12. Commonly Used Federal Sources of Residential Redevelopment Funding.

The HUD Home Investment Partnerships Program ("HOME") provides funding for certain statutorily prescribed affordable housing purposes and uses. The HOME program requires that a portion of the funding be provided to qualifying community based organizations known as Community Housing Development Organizations ("CHDO's"). The HOME program generally includes matching fund requirements and homeowner income limitations. HOME funded activities impose affordability requirements in the range of 5-20 years for assisted rental housing and 5-15 years for assisted owner occupied housing. HOME funded activities are subject to reversion/recapture requirements if program purposes are not met.

The HUD Community Development Block Grant Program ("CDBG") provides funding on an entitlement basis for certain statutorily specified "eligible" activities. CDBG monies must benefit defined "targeted groups." CDBG funded activities are subject to reversion/recapture requirements if program purposes are not met.

The Federal Home Loan Bank provides privately sourced, affordable housing programs offered through the participation of member banks. These monies are awarded under a competitive process.

13. California Constitution Article XXXIV Requirement Regarding Low Rent Housing Projects.

California Constitution Article XXXIV ("Article 34") requires that voter approval be obtained prior to any "State public body" undertaking "development, construction or acquisition" of a "low rent housing project."

The Agency is subject to Article 34.

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SECTION 12.
GLOSSARY OF MUNICIPAL GOVERNMENT TERMS

In order to provide in handy reference form the meanings of some of the words and phrases which are most often used in municipal law, we have prepared the following glossary.

Abuse of discretion. The legal basis for a judicial overturning of a Council decision. It is established in one of three ways: (1) Council failure to proceed in a manner required by law; (2) Council fails to support its decision by findings where required; or (3) Council findings are not supported by substantial evidence.

Adjourn, adjournment. Action terminating and closing a meeting entirely. If another and subsequent meeting has been previously set to take place (or is set to take place with the motion to adjourn), the adjournment may act to continue business to the subsequent meeting.

Affected taxing entity. An entity which levied property taxes within a redevelopment project area before the redevelopment plan was adopted.

Affordable Housing has the meaning set forth at Cal. H. & S. C. § 50052.5**.**

Agreement. A coming together or meeting of the minds creating an obligation respecting some property right or benefit, or the performance of an act.

Annexation. The completion of an administrative process that brings about the attaching, joining or adding of an area of land (usually contiguous) to a City's existing territory.

Answer. A pleading filed with a court by which the defendant resists a complaint by denying facts, alleging facts, and raising defenses and immunities to the matters or claims alleged.

Assessment. In a general sense, the process of ascertaining and adjusting the costs respectively to be contributed by several persons towards a common beneficial object (such as a park, street, landscaping service) according to the benefit received or burden created.

Attorney Work Product, work product. "General" work product is the work or result of efforts by an attorney (including those persons engaged by the attorney) on behalf of a client on a matter, whether in litigation or not. "Classic" work product is any writing that reflects an attorney's impression, conclusions, opinions, or legal research or theories. General work product is conditionally privileged, while classic work product is absolutely privileged. The attorney by law is regarded as the holder of the work product.

Attorney Client, Attorney-Client Communication. Information transmitted between a client and his/her lawyer. Every communication in the course of the attorney client relationship in confidence. The communication is made by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interests of the client in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted. It includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. The communication is confidential even if transmitted by fax, telephone, or other electronic means.

Blight. For redevelopment purposes, blight is established by certain physical and economic conditions within the survey area for which the plan is adopted, and by meeting the urbanization requirement.[173]

Charter. A city's "organic" law. The charter is sometimes called the city's constitution. It may be amended only by a vote of the people.

Chartered City. A city existing by virtue of, and exercising home rule powers through, a charter. Charter cities have greater and broader powers as to municipal affairs than do non-charter cities (known as "general law" cities).

City. An incorporated town or municipality. A municipal corporation deriving its powers from the state. In California, there are two types: general law city and charter city. The City of Fresno is a charter city.

Claim, tort claim, claim for damages. A writing demanding payment of monetary compensation or reimbursement, for an act, omission or occurrence by a public entity or its employee. Claims must contain the information required by law, and must be presented within the time and in the manner provided by law (in writing and sufficient to apprise the public entity of the nature of the claim).

Code. A compilation of existing ordinances systematically arranged into chapters, subheads, table of contents, indices, and revisions. It serves to clarify and make a complete body of laws designed to regulate completely the subjects to which they relate. The City of Fresno has compiled its codified ordinances in the Fresno Municipal Code ("FMC").

Codification. The process of collecting and arranging the laws or ordinances of a governmental body into a code. (See Code.)

Complaint. The (first) document initiating a civil action and filed with a court. The document is a pleading wherein a plaintiff alleges facts entitling him/her to some relief, which is typically money damages, an injunction, a declaration of rights, cancellation of a contract or other document, etc.

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[173] Health & Safety Code § 33031.

Condemnation. (See eminent domain and inverse condemnation.)

Cross-complaint. A complaint (see herein) brought by a defendant against a plaintiff (see herein) or against a third party. It concerns matters reasonably related to questions, facts, or matters raised in the initial complaint, and seeks contribution or indemnification in the defense of the initial action; or it brings in parties necessary or desirable for the full determination of the controversies raised in the initial complaint or to resolve all disputes between the parties to the initial complaint.

Declaration. Statements of fact or opinion over a disputed fact or issue, and concerning a lawsuit or proceeding, sworn or attested to under penalty of perjury. A declaration is not normally notarized.

Dedication. The giving or devoting of land to public use by some action of the owner.

Deed. A transfer of title to, or an interest in, real property by a writing signed by a person with an interest in it.

Defendant. The person named in, and against whom, a complaint has been filed. (See Complaint.)

Directory. Procedural laws which are intended to be advisory in the conduct of a public entity's affairs. Laws are generally directory when they relate to internal operations of the entity. On the other hand, where third parties are affected by the law, the laws are mandatory and the entity must follow them.

Discovery. The ascertainment of facts and documents by a party to a lawsuit through the use of interrogatories, requests for production, and depositions, and similar devices provided for in state and federal codes of civil procedure. The phase in litigation to gather relevant evidence for a case. Such evidence may or may not be admissible as evidence at a hearing or at trial.

Discretionary. An act which requires exercise in judgment and choice as to what is just and proper under the circumstances. The opposite of a discretionary act is a "ministerial" act (defined below).

Eminent domain. The power of the government to take private property for public use. Private property cannot be taken except for fair compensation, and only under strict compliance with the letter of the law.

Fair argument.. A determination under the California Environmental Quality Act (“CEQA”) which, when made, requires that an Environmental Impact Report (“EIR”) must be prepared before a project can proceed. An agency must consider the entire record and decide whether it can be fairly argued on the basis of substantial evidence in that record that the project may have a significant environmental impact on the environment. This process requires a weighing of the evidence on both sides of a question, and if substantial evidence of a significant environmental effect impact exists, evidence to the contrary does not dispense with the need for an EIR when it

can still be fairly argued that the project may have an environmental impact. The mere expression of project opponents' fears and desires lacking any objective basis for a challenge does not constitute substantial evidence supporting a fair argument. (See substantial evidence.)

Fee. Generally, the requirement for the payment of a monetary amount. Fees are generally imposed in exchange for a service or the processing of an application. Fees are of a broad range and when imposed are a legislative act. When imposed in connection with a land use development, they are subject to state law requirements concerning prior notice to the public, written justification, reasonableness of the amount, segregation and/or accounting, etc. Fees cannot exceed the estimated reasonable cost of providing the service for which they are charged, otherwise they are subject to challenge as a tax.

Findings. The determinations of fact supporting the approval or denial of a project; an explanation of how the City processed raw evidence to reach its decision. The subconclusions that expose the City's method of analyzing the facts and regulations, and of applying its policies. Findings are not generally required for legislative acts, unless required by statute or ordinance. Findings are usually required as to administrative (quasi-judicial) acts.

General law city. A municipal corporation existing under the general laws of the state, without a charter. A general law city is required to comply with all state laws.

Hearing. A proceeding with some degree of formality for the determination of issues of fact or law or both. Parties responding to it generally have a right to notice, to be heard at or prior to it, and to introduce evidence or argument or both.

Immunity, immunity from suit. Freedom from duty, penalty or obligation. The right to be free from suit for taking, or failing to take, certain action.

Implementation plan. A plan that the Agency must adopt every five years, and that identifies the methods and means by which the Agency intends to achieve its goals and objectives for the project area in the ensuing five years. It describes programs and expenditures and explains how the Agency will achieve its goals and objectives, eliminate blight, and achieve its housing objectives.

Interrogatories. A form of discovery. Written questions, from one party to a lawsuit to another party, which must be answered under oath, using due diligence in preparing the answers. Appropriate objections are permitted.

Inverse condemnation. A remedy for the breach of the constitutional requirement that property not be taken or damaged for public use unless just compensation has first been paid to the private property owner. Inverse is often described as the "reverse" side of eminent domain, as a procedural device for ensuring that the constitutional proscription is not violated. (See eminent domain, *supra*.) There are many theories which can support a claim of inverse condemnation, the most common

being a zoning or land use regulation that denies a property owner all viable economic use of his/her property and physical damage to, or invasion of, property.

Legislative. Pertaining to the function of determining what the laws shall be, relating to subjects of permanent or general character. A legislative act refers to an act which applies generally. The opposite of a legislative act is a judicial act (in a municipal context called a "quasi-judicial" act). The distinction is important because it controls what kind of due process is required for the action, whether findings are required, and what kind of standard of review a court will apply to the action in reviewing it.

License. Authority granted to do or refrain from doing any act. The certificate itself which gives permission.

Lien. A charge or security or encumbrance upon property, usually evidencing a debt, obligation or duty.

Litigation Summary. A confidential written memorandum by the City Attorney to the Council in anticipation of a closed session under the Brown Act. Litigation Summaries are privileged because they contain either *attorney-client communications* or *work product.*

Low Income Person/Household has the meaning set forth at Cal. H. & S. C. § 50093.

Mandatory. An obligatory law which is required to be performed. A law is usually considered mandatory where its operation affects a third party. The opposite of mandatory is directory.

Ministerial. A governmental decision which does not require discretion but only the application of already established standards to given facts.

Minutes. A written summary record of all the proceedings of Council by the City Clerk.

Moderate Income Person/Household has the meaning set forth at Cal. H. & S. C. § 50093.

Motion. A formal proposal of a Councilmember at a Council meeting that the Council take action or not take action.

Move, moving an item. (See also, Motion.) The act of making a motion, or that a specific motion be acted upon.

Negligence. The failure to use ordinary or due care. The breach of a duty of care by acting, or failing to act, as would a reasonable person in the same or similar circumstances.

Nuisance. In the sense of code enforcement, a continuing or unabated violation of a code provision; in a broader legal sense, everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs reasonable and comfortable use of property.

Ordinance. The enactments of the legislative body of a municipality (Council) having the force and effect of law within its boundaries.

Plaintiff. A person filing a complaint seeking some relief provided under law.

Preemption, state preemption. The preemptive authority of the state. The supervening power of the state exercised by legislating on a subject or in a field with the intent to preclude municipalities from acting on the same subject where the state has preempted the field of regulation. State law supplants municipal ordinances.

Prima facie. When the evidence in favor of a claim or argument is sufficiently strong for his opponent to be called on to answer it and, if unrebutted, would entitle one to relief.

Privileged communications. Communications, whether oral or written, by or between persons (including the Council) which the law protects as confidential as to all other persons.

Proceeding. Any action, hearing, investigation, or inquiry (by a court, administrative agency, hearing officer, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be given.

Project area committee ("PAC"). A PAC is an organized group comprised of property owners, tenants, business owners, and representatives of community organizations, that reside within a redevelopment project area, and are elected by project area property owners, tenants, business owners, and community organizations. The Agency must consult with the PAC during and after plan adoption

Public purpose. Actions of a municipality whose objects promote the public health, safety, morals, general welfare, security, prosperity, and contentment of its residents and inhabitants.

Rezoning. Changing the zoning classification of property from one to another, affecting the types of uses and structures permitted on it.

Recess. A brief intermission within a meeting which does not end it or destroy its continuity as a single gathering, after which business is resumed.

Request for Production. A form of discovery. A written request to a party to a lawsuit by another party that documents falling within certain descriptions or categories be produced.

Resolution, minute resolution. An expression of opinion, a declaration of will or intent by the Council which can have the effect of law. It usually relates to matters of special and temporary character, while an ordinance prescribes a permanent rule of conduct or government. The document reflecting such action by the Council. Minute resolutions are the City Clerk's written notation of action taken by the legislative body.

Risk Manager. The position created by the Fresno Municipal Code to investigate, manage and compromise certain claims, claims adjustment and related functions of the City.

Statute. An act of the legislature declaring, commanding, or prohibiting something; a particular law enacted by the legislature according to the forms necessary to constitute the law of the state.

Subpoena. A process to cause a witness to appear and give testimony.

Subpoena duces tecum. ("SDT"). A subpoena which also requires the witness to bring documents or other things.

Substantial evidence. Enough relevant information and reasonable inferences from this information to support a finding or conclusion. Evidence is staff reports, written testimony and oral testimony. Substantial evidence may be present to support a conclusion even though other conclusions may be reached from the same evidence. Under federal and California case law, whether substantial evidence exists is determined by looking at the whole record, and, if the contrary evidence is sufficiently strong, then it can overcome other evidence which may be substantial but for the other evidence. The substantial evidence test is considered a deferential one for purposes of judicial review. One modification of the substantial evidence test is less deferential which applies to decisions to prepare a negative declaration instead of an environmental impact report (see, Fair Argument, supra). Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment, is not substantial evidence. Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion support by facts. Uncorroborated opinion or rumor is not substantial evidence.

Summons. The document advising a person that a legal proceeding has been filed against him and requiring a response within a prescribed period.

Supremacy. The highest level of authority of the sovereign; the paramount authority of the federal government to act in specified situations, to which state and local authority must yield.

Taking. When local government adopts regulations or takes action which amount to appropriating or denying to the owner all economic use of the property. The taking of action or regulations that deny a property owner all economically viable use of his/her property and physical damage to, or invasion of, property.

Tax. A pecuniary burden laid upon individuals or property to support the government, and is payment exacted by a legislative authority. There are many types of taxes which are distinguishable from use rates, assessments, fees, and charges for municipal services.

Tax Increment has the meaning set forth at Cal. H. & S. C. § 33334.2.

Text amendment. An ordinance adding, repealing or changing the text of the Fresno Municipal Code.

Tort. The violation of a duty created or imposed by the law giving rise to a right to damages.

Ultra vires. An act beyond the scope of the power of a municipal corporation, as defined by its charter, or the laws defining or proscribing its corporate powers.

Very Low Income Person/Household has the meaning set forth at Cal. H. & S. C. § 50105.

Waiver. An act intentionally waiving, relinquishing, or abandoning a known right, claim or privilege.

Waste, waste of public funds. An unreasonable, destructive or improper use of property, or mismanagement or omission of duty of the public funds by a public body or official.

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EXHIBITS

Tabs

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